IN THE

# Supreme Court of the United States

**October Term, 1976**

No. 76-158

ANDREW VALENTINE and VALENTINE ELECTRIC COMPANY, INC.,
*Petitioners,*

—v.—

UNITED STATES OF AMERICA,
*Respondent.*

## JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Andrew Valentine and Valentine Electric Company, Inc., jointly pray that a Writ of Certiorari issue to review that portion of an order of the United States Court of Appeals for the Third Circuit entered June 24, 1976, which affirmed the judgment of conviction on Count II of the indictment herein previously entered against each of the Petitioners in the United States District Court for the District of New Jersey on June 3, 1975.

### Opinions Below

Following the entry of the judgments in the District Court, Petitioners appealed to the Court of Appeals. The as yet unreported opinion of the Court of Appeals

may be found in the Joint Appendix filed with this Petition (1a-50a).*

Upon the denial by the Court of Appeals to reverse all judgments of conviction, Petitioners and defendant Diaco jointly petitioned the Panel of the Court of Appeals which decided this case for rehearing. The remaining co-defendants jointly petitioned the Court of Appeals for rehearing with suggestion for rehearing *en banc*. By order dated July 7, 1976, all applications were denied (51a).

On July 15, 1976, the Court of Appeals, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, ordered that issuance of the certified judgment in lieu of formal mandate herein be stayed pending the timely filing of this Petition with this Court before August 6, 1976, and if such Petition is so filed, further continued the stay until final disposition by this Court (53a).

The co-defendants Dansker, Haymes and Orenstein have sought and have been granted an extension of time within which to file their respective Petitions with this Court to and including September 3, 1976. The Petitioners and defendant Diaco sought no such extension and have filed their Petitions in compliance with the time limit set by the Court of Appeals.

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* The following abbreviations are used in this Petition:

"a" is a reference to Petitioners' Joint Appendix which is sparately bound and filed with this Petition. The Appendix contains the opinion of the Court of Appeals (Appendix A); the Order of the Court of Appeals denying rehearing (Appendix B); The Order of the Court of Appeals staying the certified judgment in lieu of formal mandate (Appendix C); and the relevant statutory provisions involved (Appendix D).

"R" is a reference to the eleven volume appendix heretofore submitted to the Court of Appeals. These volumes which contain *inter alia* pre-trial and trial testimony, pleadings and exhibits will be certified to this Court;

"T" is a reference to the testimony and rulings of the District Court during trial.



## Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## Statutory Provisions Involved

1. This case involves 18 U.S.C. 1952—The "Travel Act"; and

2. 28 U.S.C. 144—a statute entitled "Bias or Prejudice of a Judge".

Both of these statutes are fully set forth in Petitioners' Appendix D. (54a-57a).

## Questions Presented for Review

Did the Court of Appeals apply an erroneous standard of review when, despite its ruling that the District Judge had erred in submitting to the jury that count of an indictment charging another with a substantive violation of the Travel Act, as well as the conspiracy count, it, nevertheless, affirmed a judgment convicting Petitioners of a substantive violation of that Act even though that judgment of conviction necessarily rested squarely upon the jury's consideration of evidence relating to the erroneously submitted counts?

Did the Court of Appeals apply an erroneous standard of review when, despite its specific finding that the District Judge had, during his tenure as United States

Attorney, made derogatory comments and undertaken repeated widespread criminal investigations into the affairs of a corporate entity as per his publicly proclaimed vows, it nevertheless, held that the District Judge did not err in refusing to disqualify himself upon proper motion in a criminal case in which the corporate entity and its officers were defendants?

## Statement of the Case

On December 30, 1974, superseding indictment 74-555 was filed in the United States District Court for the District of New Jersey upon which the Petitioners were tried before Lacey, *J.* and a jury (R. 35-50). That indictment consisted of three counts which charged a conspiracy to violate and substantive violations of 18 U.S.C. 1952—the "Travel Act" (53a).

Count I charged that from January 1, 1974 to June 30, 1974, the Investors Funding Corporation of New York ("IFC"), Norman Dansker, Stephen Haymes, Warner Norton and Donald Orenstein—IFC's President and Vice-Presidents, respectively—, Valentine Electric Company, Inc., Andrew Valentine and Joseph Diaco—Valentine Electric's President and Vice-President, respectively—, and Nathan L. Serota criminally conspired with one Arthur J. Sutton, an unindicted co-conspirator, to travel in interstate commerce and use the facilities thereof with intent to carry on the activity of bribery in violation of the laws of the State of New Jersey in order to bring about the approval by the Board of Adjustment of Fort Lee, New Jersey, of zoning variances which would permit the construction of a large commercial development known as the George Washington Plaza Project ("Project")—a real estate venture



conceived by Sutton and allegedly financed by IFC.* It was further alleged that denial of the necessary zoning variances carried with it dire financial consequences for Sutton, IFC and its officers, all of whom had become very heavily committed to the Project.

It was the Government's theory under Count I that in April, 1974, Andrew Valentine met with Sutton, advised him that the Project was facing serious opposition by Fort Lee's Mayor Burt Ross and the defendant Serota, a resident of Fort Lee, and offered to eliminate the opposition by the payment of bribes in return for Valentine Electric Company becoming the exclusive electrical contractor for the Project. It was said to be a part of the conspiracy that Dansker, Haymes, Orenstein and IFC approved the payment of bribes recommended by Valentine and advised Sutton that IFC would provide the money to pay the bribes. It was further alleged as part of the conspiracy that Serota, an outspoken opponent of the Project, agreed to withdraw his opposition to the Project and to assist in influencing official approval of the Project in exchange for a bribe; and that Diaco tried to bribe Mayor Ross in order to obtain his assistance in securing the approval necessary for the Project.

Count II charged a substantive violation of 18 U.S.C. 1952 and accused the same defendants of using interstate travel and facilities in an unsuccessful attempt to bribe Mayor Ross to use his influence to secure the approval necessary for the development of the Project.

Count III charged another substantive violation of the same statute and accused the same defendants of using interstate travel and facilities to bribe defendant

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* Norton was severed prior to trial.

Serota to withdraw his opposition to the Project and to assist in influencing official approval of the Project.*

## A. The Evidence at Trial.

The Government's evidence introduced at trial to establish the charges set forth in the indictment consisted almost entirely of:

(1) the testimony of Mayor Ross which described attempts by the defendant Diaco and by the unindicted co-conspirator, Sutton to bribe him to use his influence in favor of the Project. Mayor Ross's testimony was corroborated by tape recordings of conversations between Ross, Diaco and Sutton. Most significantly, these tapes indicate that with the exception of Diaco and Sutton, neither Petitioner Valentine nor any other defendant knew of the alleged scheme to bribe Mayor Ross; nor did the tapes even mention or remotely incriminate any one other than Diaco and Sutton in that bribery;

(2) testimony that defendant Serota had agreed to withdraw his public opposition to the construction of the Project in exchange for monetary payments. This evi-

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* Serota was described in the indictment as (1) Vice-Chairman of the Fort Lee Parking Authority; (2) an active opponent of the Project before the Board of Adjustment; and (3) the backer of a slate of Fort Lee Council candidates who were seeking election based principally upon their opposition to the Project.

Upon motions for judgment of acquittal before submission to the jury the District Judge entered a judgment of acquittal as to Serota on Counts I and II on the grounds that Serota was not a member of the conspiracy and had no knowledge of the fact that Mayor Ross was to be bribed (T. 3272). The jury found Serota guilty on Count III. That conviction was, however, reversed by the Court of Appeals and Serota's name has been ordered deleted from the caption of this case.



dence was undisputed and corroborated by documents reflecting the agreement;

(3) testimony by Sutton implicating IFC, its officers, Andrew Valentine and Valentine Electric Company, in the bribe of Mayor Ross. This testimony by an unindicted co-conspirator was *wholly uncorroborated* by either tapes or documentary evidence.

After a lengthy trial, the jury convicted the Petitioners on all three counts. Petitioner Valentine was sentenced to a jail term of five years on each count to be served concurrently and to pay a fine of $10,000 on each count. Petitioner Valentine Electric Company was sentenced to pay fines totaling $30,000 (R. 52, 56, 58).

## B. The Recusal Motions.

The motion to recuse was initially made by the defendant Diaco under indictment 74-186—the first indictment herein (R. 67, 75-90). This indictment named Sutton and Diaco as defendants and charged them with conspiracy to utilize interstate travel and facilities to commit bribery. By July, 1974 Sutton had become a "cooperating" witness (T. 1701). Thereafter, on September 10, 1974, indictment 74-370 superseded indictment 74-186 and Petitioners were also named as defendants (R. 171). When indictment 74-370 superseded the earlier charge, the motion to recuse was renewed by defendant Diaco. Petitioners Valentine and Valentine Electric also moved to disqualify the District Judge (R. 209-214). On December 30, 1974, indictment 74-370 was itself superseded by indictment 74-555 upon which this case was tried. 74-555 and 74-370 were identical in most respects. The one drastic difference was in the description of the Serota transaction. (R. 39, 175). Nevertheless, petitioners again renewed their motions to disqualify the District Judge (R. 759-765).

## Reasons for Granting the Writ

### I

**Inasmuch as the Court of Appeals ruled that the District Judge had erred in submitting to the jury that count of an indictment charging another with a substantive violation of the Travel Act, as well as the conspiracy count, the Court of Appeals applied an erroneous standard of review when it, nevertheless, affirmed a judgment convicting Petitioners of a substantive violation of that Act even though that judgment of conviction necessarily rested squarely upon the jury's consideration of evidence relating to the erroneously submitted counts.**

Although the Court of Appeals directed that a judgment of acquittal be entered as to all defendants on Count III which charged the bribe of Serota and further ordered that Count I be remanded to the District Court for a new trial or dismissal, it nevertheless, affirmed all convictions under Count II. It is the contention of the Petitioners that in affirming the convictions under Count II, the Court of Appeals has applied a new standard of review which contravenes the legal standard ennunciated by this Court and heretofore followed within the Third Circuit and elsewhere. We respectfully submit, this Court should grant review to remove this egregious imbalance within and between the Third Circuit, this Court and elsewhere.

Simply put, in reversing all convictions under Count III the Court of Appeals found that the monetary payments to defendant Serota did not constitute the crime of bribery. This result was inevitable once the Court of Appeals determined that on the basis of the record herein



Serota's public office as Vice-Chairman of the Fort Lee Parking Authority lacked significance because:

> "....the government failed to produce any evidence whatsoever indicating that he had any ability, actual or apparent, to influence official decisions concerning the project in his official capacity, or that the alleged bribers believed he could do so by virtue of his public office. Indeed, on the record before us, it is not even clear that the developers were aware of the fact that Serota was the vice-chairman of the Fort Lee Parking Authority. Hence, on the facts of this case Serota's status as a public official, a factor crucial to the government's theory of criminality, really has no bearing on the issue of whether Serota's activities violated the particular statute involved" (15a-16a.)

Accordingly, the Court of Appeals ruled that while Serota's motives, in exchange for money, to reverse his prior opposition to the Project were "hardly commendable" he did not, nevertheless, commit criminal bribery so as to permit the convictions under Count III to stand (17a).

Having so concluded, the Court of Appeals further held that the convictions under Count I of the indictment must, of necessity, be vacated. As to that Count, the District Judge had instructed the jury that on the basis of the evidence presented it could find *two* unlawful objects of the conspiracy: (1) the attempted bribery of Mayor Ross and (2) the payments to Serota. The jury was further instructed that the Government need only establish a conspiracy to accomplish *either one* of these objectives to sustain its burden of proof under Count I (T. 3882).

Given the instructions by the District Judge, the Court of Appeals was compelled to recognize that it was impossible to determine whether the jury's unspecified

finding of guilt on Count I was based on the theory of the attempted bribery of Mayor Ross, which the Court of Appeals determined was sufficient to justify conviction, or the payments to Serota, which the Court of Appeals found not to be a crime. Since the Court of Appeals concluded that the jury may have found that the defendants engaged in a conspiracy to bribe Serota alone, it could not permit the Count I convictions to stand.

In reaching the determination to vacate the Count I convictions the Court of Appeals specifically overruled the Government's contentions on appeal that inasmuch as the jury found the defendants guilty on Count II, it must have concluded that the Ross bribe was at least *one* of the conspiracy's objectives (19a). The Court of Appeals thus stated:

> "In the instant case, the possibility thus remains, albeit slim, that the jury found the defendants engaged in a conspiracy to bribe Serota alone in spite of its guilty verdict on Count II" (19a).

Despite its *specific awareness of the possibility* that in its deliberations the jury may well have considered the "Serota bribe" the Court of Appeals, nevertheless, refused to rule that the improper submission to the jury of Count III and the evidence relating thereto so infected the convictions under Count II as to require reversal. This conclusion, we submit, is factually and legally unsupportable and should not be permitted to stand.

Unlike defendant Diaco and unindicted co-conspirator Sutton, neither Petitioner Valentine nor any other defendant ever met with Mayor Ross. Thus, while the attempts by Diaco and Sutton to bribe Mayor Ross were recorded on tape, there was absolutely not a scintilla of evidence—documentary or corroborative—to implicate either Valentine or any other defendant in Count II. Indeed, with



regard to Petitioner Valentine and the co-defendants other than Diaco, the Government explicitly relied *entirely* upon a theory of *vicarious* liability and the District Judge so-charged the jury at length.* *Concededly*, the Government's entire case against Valentine and these defendants stood upon the *wholly uncorroborated* testimony of the "co-operating witness" Sutton who, although he had been caught dead on tape bribing Mayor Ross was now, as the *quid pro quo* for his testimony, the recipient of bountiful leniency by the Government (T. 1696-1701).

During the searching cross-examination of Sutton which covered more than 1,100 pages of a 2,600 page transcript, the jury became "fully aware of his (Sutton's) prior conviction, his expectations of leniency and his previous unlawful activities" (39a). Indeed, by the end of his case the prosecutor had felt compelled to admit to the jury that Sutton had come to Court as a Government witness 'seeking to curry favor" (T. 3829-3830). Given the inherently suspect character of Sutton's testimony, the possibility exists—and quite clearly—that the jury may well have rejected Sutton's testimony *entirely* and believed only Ross, the tapes and documentary evidence establishing the "Serota bribe" and his resultant change of position concerning the Project.

If this is so and such a possibility is entirely consistent with the verdict of the jury, especially in light of the successful attack during cross-examination upon Sutton's credibility—the conviction of Petitioners under

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* Specifically, the District Judge instructed the jury that each member of a criminal conspiracy was the agent of every other member; that the acts of any one member of a conspiracy in furtherance thereof are deemed to be the acts of all and all are responsible for such acts; and that responsibility exists even though such acts were done without the knowledge of a fellow conspirator (T. 3874-3878, 3881).

Count II may well have been predicated upon the jury's consideration of the evidence concerning the "Serota bribe" which was, despite the most strenuous pre-trial motions to dismiss, throughout the trial characterized as a "crime" when, in law and in fact, it was nothing more or less than the lawful exercise by an individual of his right to freedom of speech as guaranteed by the First Amendment to the Constitution of the United States.

It is, of course, totally impossible to define with absolute certainty precisely what the jury considered in rendering its general verdict of guilt under Count II. However, in light of the telling assaults during cross-examination upon the veracity of Sutton and the *conceded* lack of direct participation by any defendant other than Diaco in the attempted bribery of Mayor Ross, there exists the *eminently reasonable possibility* that the jury considered the tainted evidence concerning the "Serota bribe" in reaching its finding of guilt.

The Government's theory as manifested in the indictment and throughout the entire trial had, after all, been that the Petitioners and co-defendants criminally offered to eliminate the opposition by *both* Mayor Ross and citizen Serota. It is inevitable that in its deliberations the jury pondered how the Petitioners and co-defendants could have expected to benefit by merely eliminating the opposition to the Project of one but not the other and concluded that no such benefit could be forthcoming unless the opposition of *both* was eliminated. Indeed, the Court of Appeals, even *after* it had ruled that Serota's activities were non-criminal, nevertheless, saw fit to note that "the Serota transaction was an integral part of the defendant's scheme to obtain the variances needed for their project" (20a).



In light of the fact the *Court of Appeals, itself*, saw fit to assess Serota's perfectly lawful transactions as an "integral part of the *defendants' scheme*," how, we submit, may it be properly doubted that a *lay jury*, presented with the Government's theory of bribery of *both* Ross and Serota, and hearing, throughout a lengthy trial, Serota's activities characterized as "crimes" and "conspiratorial acts," would have considered the tainted Serota evidence in its deliberations upon *all counts*. Indeed, the "spill over" effect of 'the tainted Serota evidence must have been devastating upon the jury!

Inasmuch as the *reasonable possibility* cannot be excluded that the jury's verdict on Count II rested upon the evidence of the non-criminal "Serota bribe", all convictions under that count should have been reversed. In failing to reverse, we submit, the Court of Appeals, ignored the theory of the Government's case presented to the jury, misconstrued the thrust of Petitioners' factual argument on appeal, and as will be demonstrated below, applied a patently erroneous legal standard of review.

In affirming the judgments of conviction under Count II, the Court of Appeals stated,

> "Although the district court did err in submitting Count III to the jury, we do not believe that its error so tainted the jury's deliberations on Count II that a reversal of the defendants' convictions for bribing Mayor Ross is in order." (20a).

From the foregoing language it is patently evident that although the Court of Appeals comprehended the distinct possibility that the error of the District Judge in submitting Count III to the jury may have influenced

the jury's deliberations it, nevertheless, affirmed the judgments of conviction under Count II upon the ground that the error did not "so taint" the jury's deliberations. The gross deviation by the Court of Appeals in this case from the timeworn "reasonable possibility" standard of review on appeal has, we submit, not merely done violence to the prior holdings of other Panels within the Third Circuit but has created an irrevocable split between the Third Circuit, other Circuits and this Court.

In *United States* v. *DeCavalcante*, 440 F.2d 1265 (3d Cir., 1971), another Panel of the Court of Appeals for the Third Circuit held that a new trial was required under circumstances virtually identical to those herein. DeCavalcante and others had been convicted of a conspiracy to extort in violation of 18 U.S.C. 1952—the statute herein—and two counts which charged substantive violations of 18 U.S.C. 1952.

On appeal, the Court of Appeals held that the conspiracy had not been proven. Once the Court found that the conspiracy had not been proven, it held that the second count could not stand either since "the actions of the alleged co-conspirators [could] no longer be imputed to DeCavalcante." (*Id.* at 1276). Moreover, even though the third Count was supported by sufficient evidence independent of the conspiracy theory (like Count II, the Ross-attempted bribery count), the Panel in DeCavalcante, unlike the Panel herein, set aside the conviction on that count. In so doing the Court stated:

> "Since the Government did not establish the existence of a conspiracy, the threats by Vastola and the statements by Brennan may not be attributed to DeCavalcante. We do not know whether the jury relied on such facts and statements in its consideration of count three, but the possibilities for confusion in conspiracy trials have often been described. *We believe the possibility that the jury relied on improper evidence in reaching its verdict on count three is sufficiently serious to require a new trial as to this count.*" (Footnote omitted) *Id.*, at 1276.



In *Levy* v. *Parker*, 478 F.2d 772 (3d Cir., 1973), *rev'd on other grounds*, 417 U.S. 733 (1974), the Court of Appeals for the Third Circuit was called upon to determine whether a court-martialed army captain had been prejudiced by joinder of charges under unconstitutional articles 133 and 134 of the Uniform Code of Military Justice with a charge under valid article 90. In concluding that a new trial must be ordered, another Panel of the Court of Appeals stated:

> ". . . it is not the roll of this Court to weigh the evidence to determine whether Levy was or was not guilty of the Article 90 charge. Our sole responsibility is to decide whether there exists a *reasonable possibility* that the court-martial's finding of guilt on the Article 90 charge was influenced by evidence admitted on the Articles 133 and 134 charges. The question of the legality of the Article 90 charge was contested at trial. We cannot be certain whether the court-martial's resolution of that question was affected by evidence of Levy's anti-war sentiments" (emphasis supplied, 478 F.2d 772, 798 (1973)).

Notably, in applying the "reasonable possibility" standard of review, despite the strenuous efforts of the dissenter to distinguish away such standard, the majority in *Levy* cited with approval, *United States ex rel.*,

*Hetenyi* v. *Wilkins*, 384 F.2d 844 (2d Cir., 1965), which set the standard of review for the Second Circuit.*

In *Hetenyi*, the Court of Appeals for the Second Circuit considered a habeas corpus proceeding concerning a petitioner who had been tried for first degree murder and had been convicted of second degree murder. On appeal, the State court reversed his conviction. In a re-trial he was again charged with first degree murder and again found guilty of second degree murder. In his habeas proceedings petitioner contended that the conviction was obtained in violation of his constitutional right to be free from double jeopardy. In annulling the conviction the Court of Appeals for the Second Circuit, applied the "*reasonable possibility of prejudice*" standard enunciated by this Court in *Fahy* v. *Connecticut*, 375 U.S. 85 (1963), and adhered to by this Court in *Benton* v. *Maryland*, 395 U.S. 784 (1969). It articulated that standard of review as follows:

> "the question is not whether the accused was actually prejudiced, but whether there is *reasonable possibility* that he was prejudiced." (citations omitted, 348 F.2d 844, 865).

Here, too, we respectfully submit, the "reasonable possibility" standard of review should have been employed

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* The dissent in *Levy* was written by Chief Judge Seitz the author of the opinion in the instant case. Notably, in *Levy*, Chief Judge Seitz applied a "substantial prejudice" test—a test *not* concurred in by the majority. In his dissent in *Levy*, Chief Judge Seitz stated: "I am satisfied the joinder of the charges at trial did not *substantially prejudice* Captain Levy's constitutional right to a fair trial on the Article 90 charge" (emphasis supplied, 478 F.2d 772, 811 (1973). By utilizing his "taint" or "*substantial prejudice*" test in the instant case, the reasoning of Chief Judge Seitz in his dissent in *Levy* has now become the law of the Third Circuit despite its violence to the majority holdings in *Levy* and *DeCavalcante* and the holding of the Second Circuit in *Hetenyi*.



and the Court of Appeals should not have endeavoured to speculate upon whether the jury was or was not able to "compartmentalize" the evidence of the "Serota bribe" from the evidence of the Ross attempted bribery (20a). Inasmuch as there is an eminently reasonable possibility that the jury considered the tainted Serota evidence in its deliberations on all counts substantial potential for prejudice inhered in its verdict. The judgments of conviction against Petitioners should not, therefore, have been permitted to stand.

## II

**Inasmuch as the Court of Appeals made a specific finding that the District Judge had, during his tenure as United States Attorney, made derogatory comments and had undertaken repeated widespread criminal investigations into the affairs of a corporate entity as per his publicly proclaimed vows, the Court of Appeals applied an erroneous standard of review when it, nevertheless, held that the District Judge did not err in refusing to disqualify himself upon proper motion in a criminal case in which the corporate entity and its officers were defendants.**

Pursuant to 28 U.S.C. 144, the Petitioners and defendant Diaco duly moved the District Judge to disqualify himself upon the ground, *inter alia*, of his bias and prejudice towards them—a bias and prejudice so pervasive and overwhelming as to deny the Petitioners a fair trial and due process of law. The District Judge held the moving affidavits to be insufficient *on the merits*, refused to disqualify himself and presided over the trial. The Court of Appeals held the District Judge committed no error in presiding at the trial. As will be shown more fully

below, inasmuch as the Court of Appeals applied an *utterly erroneous* standard for review, its ruling contravenes the statutory language of 28 U.S.C. 144, as well as the rulings of this Court, and should not be permitted to stand.

In the instant case, the affidavits filed by the Petitioners and defendant Diaco in support of their respective motions for recusal of the District Court were in full compliance with the requirements set forth in 28 U.S.C. 144 (55a). To the extent that generalization is at all possible, these affidavits established, irrefutably we submit, that the bias of the District Judge towards the Petitioners and defendant Diaco was *actual, explicit, bias in fact, directed towards them personally, of long-standing duration, well-documented and given the greatest exposure by the media at the behest of the District Judge when he served as United States Attorney for the District of New Jersey and thereafter, by his successor United States Attorney.*

As fully set forth in the affidavits of Petitioner Valentine and defendant Diaco, during his tenure as United States Attorney, the District Judge repeatedly and consistently singled out the *Valentine Electric Company* as having sinister and criminal connections with "organized crime" and unalterably pledged himself to make the Valentine Electric Company the subject of criminal investigation—a pledge given the greatest amount of publicity possible (A. 80-86). True to his promise, between 1969 and 1971, Valentine Electric Company became the subject of numerous widespread criminal investigations. Its name was repeatedly sullied in the press by the then United States Attorney; its competitors were publicly invited by the District Judge to bring complaints to the attention of the office of the then United States Attorney; and its



records were repeatedly subpoenaed and presented before Grand Juries inquiring into its business transactions. Ultimately, indictments were handed down against, among others, employees and shareholders of Valentine Electric charging them with, among other things, acts of extortion on and off the premises of Valentine Electric Company.*

In short, the affidavits in support of recusal established *not merely* an attitude of the District Judge evincing the appearance of bias; or a judicial bias directed at the legal issues, the movants' attorneys, or in general; or a bias of short duration possibly developed during the course of the litigation; or merely some nebulous assertion of possible prejudice. (c.f. *Laird* v. *Tatum*, 409 U.S. 824 (1972); *Wolfson* v. *Palmieri*, 396 F.2d 121 (2d Cir., 1968). Rather, the instant affidavits conclusively established *not only reasonable support* for the movants' belief—the quantum of proof required by 28 U.S.C. 144—but they established an irrefutable *factual basis* for the movants' assertion that the District Judge should have disqualified himself.

Despite the irrefutable factual allegations of bias contained in the movants' affidavits and the woeful failure by the District Judge, despite his blockbuster tactics and strained interpretations at oral argument to cast doubt upon counsel filing the requisite certificates of good faith in support of the respective recusal motions, the Court of Appeals, nevertheless, ruled that the District Judge had not committed error in failing to disqualify himself.**

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* See *United States* v. *Addonizio*, 451 F.2d 49 (3rd Cir., 1972), *cert. denied*, 405 U.S. 936 (1972).

** The transcript of the hearing is replete with heated assertions by the District Judge that the recusal motions reflect unfavorably upon his "capacity" and "integrity". (R. 108-136, 164-165; s.a. 1-100). "s.a." refers to "supplemental appendix" (Volume Eleven) submitted to the Court of Appeals.

This ruling by the Court of Appeals we submit, not only embodies a casuistic perversion of the facts, but a totally erroneous misapplication of the law concerning a motion to recuse pursuant to 28 U.S.C. 144.*

28 U.S.C. 144, states as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

The applicable standards for determining the legal sufficiency of an affidavit in support of a recusal motion were definitively set forth by this Court in *Berger* v. *United States*, 255 U.S. 22 (1921). In *Berger*, it was established that although it is the duty of the trial judge against whom a recusal motion is filed to pass upon the legal sufficiency of the affidavit in support of the recusal motion, the truth of the factual allegations set forth in the affidavit in support of the recusal may not be questioned

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*28 U.S.C. 455 also deals with disqualification of a sitting Judge. Even though the recusal motions herein were *not* predicated upon 28 U.S.C. 455, inasmuch as that statute may be relevant to this Court's consideration of the issue presented, we have set it forth in full in Appendix D (55a-58a).



and must be assumed true for the purpose of testing the sufficiency of the affidavit. Thus, in *Berger*, this Court quoted with approval the following language of the Fifth Circuit Court of Appeals in *Henry* v. *Speer*, 201 F. 865 (5th Cir. 1913):

> "Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code (Comp. St. § 987). He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification" (255 U.S. 22, 36).

"Legal sufficiency" of the affidavit was defined in *Berger* as follows:

> "Of course the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment" (255 U.S. 22, 35).

The affidavits of Petitioner Valentine and defendant Diaco in support of their respective recusal motions and the certificates of good faith filed by their respective counsel, when viewed through the crucible of the *Berger* test, we submit, state with particularity such material facts as would lead any reasonable man to conclude that the District Judge manifested a long-standing, irrevocable and irrefutable personal bias towards the movants. This would have the inevitable effect of precluding him from acting as "a neutral factor in the interplay of adversary forces"—the proper role of a judge in a criminal trial.

*American Bar Association Standards Relating To The Function of the Trial Judge*, p. 3, June, 1972. *A fortiori*, the District Judge should have "proceed(ed) no further therein" and was duty-bound to disqualify himself as a matter of law. 28 U.S.C. 144; *United States* v. *Thompson*, 483 F.2d 527 (3rd Cir., 1973); *United States* v. *Townsend*, 478 F.2d 1072 (3rd Cir., 1973). See also, dissent of J. MacKinnon in *Mitchell* v. *Sirica*, 502 F.2d 375 (D.C. Cir., 1974); *Disqualification of a Federal District Judge for Bias*, 57 *Minn. L. Rev.* 749 (1973); *Disqualification of Judges for Bias in the Federal Courts*, 79 *Harv. L. Rev.* 1435 (1966).

In affirming the judgment of the District Court, the Court of Appeals stated the rationale for its holding as follows:

> "Neither Valentine nor Diaco make a single allegation indicating that the district judge ever manifested, by word or deed, any hostility, animosity, or, for that matter, any emotion whatsoever towards them personally" (24a).*

From that language it is palpably clear that despite the statutory requirement of 28 U.S.C. 144 that the recusal motion be *perspective* in nature and the holding of *Berger* which long-ago established the standard to be "fair sup-

* Most notably, despite such a sweeping statement, The Court of Appeals, shortly thereafter, felt compelled to concede that "the status of Valentine Electric Company raises a somewhat more difficult problem in light of the fact that the district judge both investigated it and made derogatory comments concerning it while serving as United States Attorney" (24a).

Nevertheless, by the use of what may only be described as the epitome of specious reasoning, the Court of Appeals facilely concluded that *despite* the vituperative and jaundiced statements of the District Judge towards Petitioner Valentine's close corporation and namesake, there was no error.



port to the charge of a bent of mind that may prevent or impede impartiality of judgment" upon factual allegations which *may not* be questioned and *must* be assumed true, the Court of Appeals has, by its holding herein, established the standard for recusal in the Third Circuit to be a *retrospective* determination as to whether or not the trial judge evinced *actual venal antipathy* to the movant at some time during the proceedings upon facts which *may* be contested. Inasmuch as this standard subverts the holding of *Berger* and 28 U.S.C. 144, we respectfully submit, this Court should grant review.

While we are not unmindful that a federal judge has a duty to sit where not disqualified (*Laird* v. *Tatum*, *supra*, p. 837), in the instant case, measured by the *Berger* standard, it was incumbent upon the District Judge to conclude that given his publicly stated intentions and his predominant role in the widespread and continuous criminal investigations of Valentine Electric and its principals while he served as United States Attorney, his impartiality as a judge in a criminal trial involving, among others, Andrew Valentine and Valentine Electric would be reasonably, if not assuredly, questioned—and properly so! Contrary to the opinion of the Court of Appeals, this was *not* merely a case of "an impersonal prejudice [going] to the judge's background and associations." (c.f.) *Parker Precision Products Co.* v. *Metropolitan Life Ins. Co.*, 407 F.2d 1070 (3d Cir. 1969). Indeed, on this record the District Judge was an "accuser" who "also sat in judgment". *Mitchell* v. *Siricia*, *supra*, p. 385.

Moreover, the District Judge's misplaced belief that despite the compelling nature of the facts presented in the recusal affidavits, he could, nevertheless ,be impartial, is of no consequence in light of 28 U.S.C. 144, and in light of everyday teaching and experience.

In *In Re Murchison* this Court stated:

> "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the contending parties. But to perform its high function in the best way "Justice must satisfy the *appearance of justice*" emphasis supplied, 349 U.S. 133, 136 (1955).

See also, *Offutt* v. *United States*, 348 U.S. 11 (1954); *Commonwealth Coatings Corp* v. *Continental Casualty Co.*, 393 U.S. 145 (1968).

Perhaps the concept was best expressed in the words of Judge Cardozo when he long-ago stated:

> "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the result is an outlook on life, a conception of social needs, a sense in James' phrase of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choices will fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought—a form of pleading or an act of parliament, the wrongs of paupers or rights of princes, a village ordinance or a nation's charter."

Cardozo, *The Nature of the Judicial Process*, Yale University Press, pps. 12-13, 1922.



## CONCLUSION

**For all of the above reasons the petition for a writ of certiorari should be granted; the judgments of conviction should be reversed; and a new trial should be ordered.**

Respectfully submitted,

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IN THE

# Supreme Court of the United States

October Term, 1976

No. 76-158

76-159

ANDREW VALENTINE, VALENTINE ELECTRIC COMPANY, INC., and JOSEPH DIACO,
*Petitioners,*

—v.—

UNITED STATES OF AMERICA,

## JOINT APPENDIX TO JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## INDEX TO APPENDIX

## APPENDIX A

## Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 75-1685/92
(June 2, 1976)

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UNITED STATES OF AMERICA

—v.—

NORMAN DANSKER, JOSEPH DIACO, STEVEN HAYMES, WARNER NORTON, DONALD ORENSTEIN, NATHAN L. SEROTA, ANDREW VALENTINE, INVESTORS FUNDING CORPORATION OF NEW YORK, VALENTINE ELECTRIC COMPANY,

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Norman Dansker, Appellant in No. 75-1685
Joseph Diaco, Appellant in No. 75-1686
Stephen Haymes, Appellant in No. 75-1687
Donald Orenstein, Appellant in No. 75-1688
Nathan L. Serota, Appellant in No. 75-1689
Andrew Valentine, Appellant in No. 75-1690
Valentine Electric, Appellant in No. 75-1691
Investors Funding Corp. of New York,
Appellant in No. 75-1692

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(D.C. Criminal No. 74-555)

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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Argued February 4, 1976
Before SEITZ, *Chief Judge*, VAN DUSEN and WEIS,
*Circuit Judges*.

*APPENDIX A—Opinion of the United States Court of Appeals for the 3rd Circuit (June 2, 1976)*

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*APPENDIX A—Opinion of the United States Court of Appeals for the 3rd Circuit (June 2, 1976)*

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## OPINION OF THE COURT

(Filed June 2, 1976)

SEITZ, *Chief Judge.*

The defendants Dansker, Haymes, Orenstein, Diaco, Valentine, Valentine Electric, and Investors Funding Corporation were convicted under a three count indictment charging them with conspiracy to violate the Travel Act, 18 U.S.C. § 1952, and with substantive violations of the statute. Count I alleged that they had conspired to utilize the facilities of interstate commerce to bribe Burt Ross, the mayor of Fort Lee, New Jersey, and the defendant Nathan Serota, vice-chairman of the Fort Lee Parking Authority, in order to gain zoning variances and other official approvals which would permit the construction of a large shopping center complex in Fort Lee. The remaining counts of the indictment charged them with the bribe of Ross (Count II) and the bribe of the defendant Serota (Count III). The remaining defendant, Serota, was convicted solely under Count III of the indictment which charged him with accepting a bribe in violation of New

Jersey law. The defendants have appealed, alleging numerous infirmities in their convictions.

THE FACTUAL BACKGROUND:

The evidence, viewed in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60 (1942), may be summarized as follows: Fort Lee, N.J., is a community of approximately 40,000 residents located at the western terminus of the George Washington Bridge. In 1971, Arthur Sutton began acquiring real estate in that community for commercial development. His efforts were financed to a large extent by the defendant Investors Funding Corporation ("IFC").[1] During 1972 and 1973, the financing arrangement between Sutton and IFC was used by the principals of IFC, defendants Dansker, Haymes, and Orenstein (the "IFC defendants"), to divert approximately $5,000,000 in IFC funds to their personal use.

Although much of the property acquired by Sutton and IFC was zoned non-commercial, they ultimately decided to build a huge shopping center complex on it. To this end, Sutton petitioned the Fort Lee Board of Adjustment in late 1973 for zoning variances permitting the construction of the project. Plans for the complex were announced publicly in early 1974.

A large segment of Fort Lee's populace reacted strongly to the proposal. One of the leaders of this opposi-

[1] Since IFC could only act through its officers and agents, its criminal responsibility in this matter is predicated solely upon the alleged misconduct of its principals, Dansker, Haymes, and Orenstein.

Hence, a reversal of the convictions of the IFC defendants would inure to the benefit of the corporation. *E.g., United States* v. *American Radiator & Stand. San. Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970).



tion was the defendant, Nathan Serota, the vice-chairman of the Fort Lee Parking Authority. Serota was a builder on Long Island but resided in an expensive condominium apartment located in Fort Lee near the proposed project complex. Although he took no action in his capacity as a public official, Serota paid for advertisements in local newspapers opposing the project and helped form a citizens group which brought lawsuits against the developers. In addition, he organized and financed a slate of candidates for the Borough Council who made the proposed complex the major issue in the upcoming elections. However, Serota and the project's opponents concentrated their immediate efforts on blocking approval of the developers' petition for variances then pending before the local Board of Adjustment.

Public hearings on Sutton's petition began before the Board of Adjustment in early March 1974. From the outset, Serota, accompanied by counsel, regularly attended the hearings and took an active part in them. By April, it became evident that the project had little chance of gaining the needed variances.

At this point defendant, Andrew Valentine, president of the defendant, Valentine Electric Company,[2] approached Sutton and offered to assist in obtaining official approval for the project in exchange for an opportunity to receive the electrical contract for the complex. At a subsequent meeting between them, Valentine suggested that their problems could be solved by buying off the two major opponents of the project, Serota and Mayor Ross. Sutton

[2] Valentine Electric Company's criminal responsibility in this matter is also predicated upon the alleged misconduct of its principals, the defendants Valentine and Diaco. Consequently, a reversal of the convictions of those defendants would inure to its benefit.

then relayed this proposal to the IFC defendants who approved such an approach and agreed to finance it.

In the weeks that followed, Serota was contacted by Valentine. They worked out an agreement under which Serota would sell his Fort Lee apartment, valued at $500,000, to the developers for $900,000. In addition, Serota would agree to cease his opposition to the project and take active steps to secure its approval in a modified form. Serota was to also receive an additional $200,000 in cash on the date his apartment was sold.

The actual sale of Serota's apartment was consummated on May 15. Under the terms of the contract, Serota sold his apartment for $900,000 ($250,000 down, $650,000 in deferred payments) to Herman Lasker, defendant Orenstein's brother-in-law, as agent for an undisclosed principal. The purchaser agreed to sublease the apartment back to Serota rent-free until September 30, 1978. The contract also contained a provision stating that Serota agreed to halt his opposition to the project. However, no mention at all was made of Serota's agreement to assist in obtaining official approval for the project or the additional $200,000 in cash he received on the closing date.

Having "taken care" of Serota, the defendants turned their attention to Mayor Ross. On May 19, a meeting took place between Ross and the defendant Joseph Diaco, a principal of Valentine Electric, at which Diaco sought to have Ross postpone the Board of Adjustment's decision on Sutton's petition which was then scheduled for May 22. When Ross indicated that he could not, Diaco asked him, "Would money help?". The meeting closed with Ross' agreement to meet with the developers' attorneys, but only after the Board of Adjustment rendered its decision. Ross secretly reported the incident to the United States Attorney's Office the following day, and thereafter worked with it in its investigation of the matter.





On May 22, Ross met with Diaco once again and had several telephone conversations with him. Diaco continually urged him to delay the Board's decision scheduled for that evening. This time, however, he offered him first $200,000, then $400,000, and finally $500,000 for his cooperation. During the last phone conversation of the day, which was taped, Diaco repeated his $500,000 bribery offer and threatened to expose "something about [Ross'] administration" if he refused to go along. Ross, however, would only agree to meet with the defendants' attorneys after the variances had been turned down.

As expected, without Ross' intervention the Board voted down Sutton's petition. An outright rejection carried with it dire financial consequences for IFC which was then heavily indebted to several New York banks. Consequently, in order to placate IFC's creditors, Sutton and the IFC defendants decided to submit a modified version of the project to the Board in the near future. It was imperative that this modified proposal quickly receive official sanction. To this end, Valentine was again enlisted to attempt to secure Ross' assistance.

On May 24, Ross, wearing a body recorder provided by the FBI, met with Diaco in a Hackensack, N.J. restaurant. They discussed the means by which approval of the project in its revised form could be obtained. For his assistance, Ross was offered $100,000 as an advance to evidence Diaco's good faith, with an additional $200,000 to $400,000 to be forthcoming. Ross feigned acceptance of the proposal and agreed to meet further with Diaco and Sutton.

Ross' meeting with Diaco and Sutton took place on May 26 in a Paramus, N.J. diner. Ross was again equipped with a body recorder. The three discussed in detail the modified version of the project. Sutton stated

that approval of it was needed by June 17. They then turned to the subject of the bribe. Ross indicated that he did not believe that $100,000 was overly generous. However, he accepted $100,000 in cash from Diaco. Later that day, he delivered this money to the FBI.

By May 29, IFC was under heavy pressure from the New York banks holding its notes. In order to avoid financial disaster a definite date on which the modified proposal would be placed on the Board's agenda was needed. Consequently, the IFC defendants contacted Sutton and urged him to finalize arrangements.

The following day, Ross, Sutton, and Diaco met once again. The three agreed that the revised plan would be submitted to the Board on June 7. It was hoped that official approval could then be obtained within ten days. For his part in the scheme, Ross would receive $200,000 in cash when the Board approved the plan and an additional $200,000 in monthly installments of $25,000. This proved to be the final clandestine meeting between Ross and any of the defendants for on May 31, the initial indictments in this prosecution were handed down.

Originally, Sutton and Diaco were indicted for conspiracy to bribe Mayor Ross. This first indictment was dismissed with leave of the court after Sutton was permited to plead guilty to a lesser offense in exchange for his agreement to furnish evidence on behalf of the government. Thereafter, a second indictment was handed down against all the defendants in the instant appeal. This second indictment was superseded by a third which charged the defendants with the identical crimes, but contained additional allegations and corrected arguable defects in the second. The defendants appeal from their convictions under this third indictment.





ISSUES ON APPEAL:

I. *Attack on Count III*

*A. Serota's Appeal*

Defendant Serota has raised numerous challenges to his conviction under Count III, the principal of which is that his conduct failed to violate the Travel Act, 18 U.S.C. § 1952. The Travel Act makes it a federal offense for an individual to utilize the facilities of interstate commerce with the intent "to further any unlawful activity". It goes on to define "unlawful activity" as the crimes of "extortion, bribery or arson in violation of the laws of the state in which committed or of the United States". Serota was charged with violating this federal statute by accepting a bribe in violation of the laws of New Jersey. He vigorously asserts, however, that the actions charged and proven against him fail to constitute bribery under any definition of the crime.

At the outset we note that the Travel Act incorporates into federal law New Jersey's substantive law of bribery for this particular case, even though it contains a more expansive definition of the crime than that found at common law. The Travel Act does not reach only those state offenses which would have constituted the crimes of "extortion, bribery, or arson" at common law. Rather, all state offenses which can be generically classified under those headings fall within its purview. *United States* v. *Nardello*, 393 U.S. 286 (1968).

This broad interpretation of the Act has enabled it to encompass state statutory expansion of the crimes of extortion, bribery and arson over the years, and thus more effectively carry out its purpose of aiding local law enforcement efforts to combat "pernicious undertakings which cross state lines". Hence, in *Nardello*, the Supreme

Court held that the defendant's "shakedown" operation could constitute extortion within the meaning of the Travel Act even though a private citizen could not commit the crime of extortion at common law and the particular state involved classified the defendant's activities as blackmail.

As will become evident in our discussion of New Jersey law, the conduct prohibited by the relevant New Jersey bribery statute easily comes within the generic term of bribery. Consequently, we will analyze Serota's activities in terms of New Jersey law in determining whether they violated the Travel Act.

In maintaining that his conduct failed to constitute the acceptance of a bribe, Serota raises two main arguments. First, he contends that it was neither charged nor proven that the alleged bribers paid him any monies because of his status as vice-chairman of the Fort Lee Parking Authority. In this regard, he points out that there is no record evidence indicating that the influence he agreed to exert on behalf of the developers derived in any way from his official position or that the alleged bribers believed that he could influence public decisions concerning the project by virtue of his public office. Secondly, he asserts that the government made no effort to establish that he was to act in a manner other than that permissible for any private citizen in attempting to influence official actions with respect to the project.

The government contends, however, that Serota's arguments are immaterial under its construction of the relevant New Jersey law. That law does not require that a public official agree to be influenced in connection with his official duties. Indeed, the recipient need not be a public official at all. Rather, the government maintains, the crime is made out whenever the recipient agrees to accept payment with the "corrupt intent" to influence any official action whatsoever.





Although in arguing that any individual may be guilty of accepting a bribe under New Jersey law, the government asserts that the requisite corrupt intent is much easier to establish when a public official is the recipient. Since a public official is bound by rules of honesty and integrity far more stringent than those imposed on private citizens, it argues that it need only be shown that a public official accepts a personal benefit in exchange for his agreement to influence any official action, whether in a lawful manner or not.

Under its interpretation of the relevant New Jersey law, the government insists that the evidence below is sufficient to sustain Serota's conviction. It is undisputed that Serota was a public official who accepted monies from the developers. The evidence justified a finding that, in exchange for this payment, he agreed not only to halt his opposition to the project, but also to take affirmative steps to secure official approval for it in a modified form. In this latter respect, the record indicates: (a) that Serota agreed to issue a public statement favoring the modified project's construction; (b) that he changed his stance at the Board of Adjustment's hearings from one opposing the project to one supporting it in a reduced format; (c) that shortly after the sale of his apartment, he told Valentine, "We can take care of the hearings. We'll cooperate with you"; and (d) that he agreed to speak to his slate of candidates in order to induce them to support a limited project and, if ultimately elected, to assist in obtaining official approval for it. The government concludes that an agreement by a public official to influence governmental action in this manner in exchange for money establishes his "corrupt intent" and thus violates New Jersey's law of bribery.

The pertinent New Jersey statute provides as follows:

N.J.S.A. 2A:93-6

> Any person who directly or indirectly gives or receives, offers to give or receive, or promises to give or receive any money, real estate, service or thing of value as a bribe, present or reward to obtain, secure or procure any work, service, license, permission, approval or disapproval, or any other act or thing connected with or appertaining to any office or department of the government of the state of any county, municipality or other political subdivision thereof, or of any public authority, is guilty of a misdemeanor.

Certainly, on its face, it would appear to encompass Serota's conduct. It does not require that the recipient of a bribe be a public official, or if a public official, that he agree to be influenced with respect to his official duties. Nor does it require that the recipient somehow attempt to influence governmental action in an unlawful or otherwise corrupt manner. Rather, the statute, by its terms, makes it unlawful for any individual to accept any benefit in exchange for his agreement to influence any official action in any manner.

Obviously, the statute cannot be read in such a literal fashion without running afoul of the first amendment. The government implicitly concedes this point by attempting to engraft a "corrupt intent" element onto it. Consequently, we must resort to the relevant New Jersey case law in order to obtain the proper construction of the statute.

Our analysis of the most recent New Jersey cases construing the statute indicates that it was designed to reach only that conduct which has been the traditional concern of the law of bribery—conduct which is intended, at least by the alleged briber, as an assault on the integrity of a public office or an official action. The only expansion of





the common law crime seemingly effected by the statute is that any individual may be convicted of accepting a bribe if he in fact possesses, or creates the appearance that he possesses, the ability to influence official conduct. In expanding the law's ambit to include both actual and would-be brokers of governmental corruption, the New Jersey legislature apparently intended to deter all individuals willing to purchase such governmental influence, and thus better insulate public actions from corruption. *See State* v. *Ferro*, 320 A.2d 177 (App. Div.), *cert. denied*, 65 N.J. 566 (1974). However, whether the recipient is a public official or a private citizen, the gravamen of the offense remains the same. The recipient must agree to utilize whatever apparent influence he might possess to somehow corrupt a public office or an official act.

A close examination of both cases relied on by the government for its broad interpretation of the statute supports our more narrow construction. In *State* v. *Sherwin*, 317 A.2d 414 (App. Div.), *cert. denied*, 65 N.J. 569, *cert. dismissed*, 419 U.S. 801 (1974), the defendant, New Jersey's Secretary of State, was convicted of accepting a bribe under the statute in question. He had urged the state's Commissioner of Transportation to reject the low bid on a highway contract in favor of that submitted by a contractor who had enlisted his aid by contributing $10,000 to his political party. On appeal, the defendant argued, among other things, that he could not be found to have violated the statute without a showing that he possessed the official authority to effect the governmental action sought.

In affirming his conviction, the court found it immaterial that he lacked such official authority. However, the court did not base its decision on the mere fact that the defendant was a public official as the government seems to suggest. Rather, the court found that the defendant

had violated the statute because he had used the "opportunity to perform a public duty as means of acquiring an unlawful benefit". 317 A.2d at 422. Obviously, the "public duty" referred to was that of the Department of Transportation, since the defendant possessed none with respect to the highway contract involved. Hence, liability was predicated on the fact that the defendant, in exchange for favors, had agreed to utilize whatever apparent influence [3] he might possess to undermine the integrity of the decision-making processes of that governmental body.

That the essence of the offense remains an agreement to corrupt a public office or action is even more evident in *State* v. *Ferro, supra.* There, the defendant was the local leader of the Democratic Party but held no public office. He was convicted of accepting a bribe upon a showing that he had accepted money from two defendants in pending state criminal prosecution in exchange for his agreement to use his influence in order to secure for them favorable treatment from the local probation office and state courts. In affirming his conviction, the court rejected his argument that N.J.S.A. 2A:93-6 did not reach the activities of private citizens. Rather, the court found that the statute was aimed at both actual and would-be brokers of governmental corruption, and that, as a result, any individual could be guilty of accepting a bribe so long as he created an understanding with the briber that "he [could] influence matters in connection with an official duty." 320 A.2d at 179. As the court went on to state:

> "The most reasonable interpretation of this provision is that it was designed to broaden the offense of bribery so as to include the peddling of influence by a person in an apparent position of access

[3] Moreover, that he possessed influence in this matter is evident from the fact that the Commissioner initially acceded to his request and rejected the low bid. 317 A.2d at 417-18.





> to a public official. Such activity is not penalized by the common law. *Yet, being a common evil which denigrates the integrity of our public institutions, the Legislature undoubtedly intended to proscribe such conduct.*" (emphasis added). 320 A.2d at 180.

Our construction of the pertinent New Jersey bribery statute, then, differs greatly from that pressed upon us by the government. The statute does not make criminal an agreement by a public official to influence, in an otherwise lawful manner, governmental action unrelated to his office because, in entering such an agreement, he violates some nebulous standard of propriety imposed on public officials by law. Rather, in order to establish a violation of the statute, it must be demonstrated: (a) that the alleged recipient, whether he be a public official or not, possessed at least the apparent ability to influence the particular public action involved; and (b) that he agreed to exert that influence in a manner which would undermine the integrity of that public action.

In view of the government's erroneous interpretation of the relevant law, it is not surprising that the evidence adduced below, even when viewed in the light most favorable to the government, is insufficient to sustain a conviction under the statute, properly construed. With respect to the first factor noted above, although it is clear that Serota was a public official, the government failed to produce any evidence whatsoever indicating that he had any ability, actual or apparent, to influence official decisions concerning the project in his official capacity, or that the alleged bribers believed he could do so by virtue of his public office. Indeed, on the record before us, it is not even clear that the developers were aware of the fact that Serota was the vice-chairman of the Fort Lee Parking Authority. Hence, on the facts of this case Serota's status as a public

official, a factor crucial to the government's theory of criminality,[1] really has no bearing on the issue of whether Serota's activities violated the particular statute involved.

Moreover, an examination of the record fails to disclose any evidence suggesting that Serota had any access to the Board of Adjustment in some unofficial capacity which the developers were interested in purchasing. Rather, the only influence, discernible from the record, which Serota possessed in these matters was that derived from his activities as a private citizen vocally opposing the project's development. And, a fair reading of the record indicates that it was in this capacity as "the leader of the . . . biggest portion of the opposition" that he was approached by the developers.

Turning to the second prong of our analysis, we agree that the evidence introduced by the government conclusively establishes that Serota agreed to halt his previous opposition to the project and publicly exert his considerable influence in the developers' behalf. However, even though the evidence demonstrates that he agreed to take "affirmative" steps to secure official approval for the project in a modified form, without more, it fails to justify a finding that, in so doing, he was to engage in any conduct that would corrupt the activities of the Board of Adjustment. Certainly, his public reversal of his prior

[1] Indeed, the government seemed to rely entirely on this factor as evidenced by the prosecutor's following statement:

> "He [counsel for Serota] suggests, for example, if Mr. Serota had been another member of the Fort Lee Aroused Citizens and had not been vice chairman of the Parking Commission of Fort Lee perhaps no crime would have been committed and perhaps he is right, but the star[k] fact here is that Mr. Serota is in fact a public official. As such, the law imposes upon him obligations that it does not impose on private citizens."



stance against the project, even if motivated by financial considerations, could not subvert the integrity of that governmental body. Nor would his efforts to induce his slate of candidates to endorse a limited project since they obviously possessed no authority whatsoever in these matters prior to their election.

The only remaining piece of evidence relied on by the government—Serota's statement to the effect that he would "take care" of the hearings by cooperating with the developers—fails to raise an inference of criminality when viewed in the context of the entire record. As previously noted, there was no record evidence suggesting that Serota could influence the Board of Adjustment in any manner other than by ceasing his opposition to the project and publicly supporting its construction. Hence, against this background, Serota's statement can only be reasonably interpreted as his agreement to take a stance in favor of the project before the Board. *See United States* v. *Cades*, 495 F.2d 1166, 1169-70 (3d Cir. 1974); *United States* v. *Finnerty*, 470 F.2d 78, 81 (3d Cir. 1972). Moreover, even if this single statement could support some inference of illegality, we would find it insufficient to justify Serota's conviction, especially in view of the government's burden of proof and the possible infringement of Serota's first amendment rights to freedom of speech.

We therefore find that the evidence below establishes nothing more than Serota's agreement, in exchange for money, to withhold his prior opposition to the project and publicly advocate its construction in a reduced form. While Serota's motives in entering an agreement of this nature are hardly commendable, there is no suggestion that he agreed to corruptly influence the Board of Adjustment. Accordingly, we hold that the government failed to prove that Serota violated the statute in question. His conviction under Count III will therefore be reversed.

B. *Appeal of the Remaining Defendants*

What we have said concerning the sufficiency of the evidence under Count III with respect to Serota also holds true for his alleged bribers, the remaining defendants in this case. In order for that evidence to sustain their convictions for bribing Serota, it must demonstrate, at a minimum, that, in purchasing his support, they intended to corrupt the decision-making processes of the Board of Adjustment, the governmental entity he was to influence. Evidence of this nature, however, is totally absent on the record before us. Rather, the evidence, taken in its entirety, establishes only their intent to silence Serota's vocal opposition and enlist his public support through their payments to him. Reprehensible as this may be, it simply fails to violate New Jersey's law of bribery. Consequently, their convictions under Count III must also be reversed.

II. *Issues Raised Jointly by the Defendants Under Counts I and II*:

Before turning to the alleged errors of the trial court, we will first consider the defendants' contention that their convictions under Counts I and II must also be reversed, if, as we have already determined, the evidence under Count III was insufficient to support their convictions for bribing Serota.

With respect to Count I, the defendants argue that in view of our decision on Count III, it is no longer possible to determine whether they were convicted of a conspiracy properly charged and proven. Count I alleged that the defendants had conspired to bribe Ross and Serota. The district court, however, instructed the jury that if it found that the alleged conspiracy had as its illegal objective *either* the bribe of Ross or Serota it could convict the





defendants. The conspiracy count was thus submitted to the jury on alternative theories, only one of which, in retrospect, was sufficient to justify a conviction. The jury then rendered a general verdict of guilty on Count I making it impossible to identify the grounds on which its decision was based. Consequently, the defendants assert that their convictions may have rested solely on a finding that they had conspired to bribe Serota and must, therefore, be reversed.

In response, the government maintains that any lingering doubts as to the basis of the jury's verdict on Count I are dispelled by its decision on Count II. Since the jury there found the defendants guilty of jointly bribing Mayor Ross, the government insists that it must have also determined that the Ross bribe was at least one of the conspiracy's objectives. The government therefore concludes that the validity of the conspiracy convictions are in no wise jeopardized by our decision with respect to Count III.

We cannot agree. The government's position ignores the fact that the crime of conspiracy is separate and distinct from the related substantive offense. It requires proof of the additional element of an agreement between the alleged co-conspirators. *Pinkerton* v. *United States*, 328 U.S. 640 (1946); *United States* v. *Pappas*, 445 F.2d 1194 (3d Cir. 1971). Hence, it is neither illogical nor impossible for a jury to find an alleged conspiracy nonexistent while, at the same time, convicting the defendants of the substantive offenses charged.

In the instant case, the possibility thus remains, albeit slim, that the jury found that the defendants engaged in a conspiracy to bribe Serota alone in spite of its guilty verdict on Count II. As a result, the defendants' conspiracy convictions must be vacated and this case remanded to the district court for a new trial unless it determines

that Count I, in its present form, is fatally defective in light of the conclusions reached herein.

As to their convictions under Count II for bribing Mayor Ross, the defendants argue that the improper submission to the jury of Count III and the evidence relating thereto so infected their convictions that a new trial is warranted. In this regard, the defendants do not suggest that the evidence below was insufficient without that of the Serota bribe to support the jury's verdict on Count II. Rather, they contend that they were unduly and improperly prejudiced on Count II by the jury's consideration of the purported Serota bribe and its finding of guilt thereon.

Although the district court did err in submitting Count III to the jury, we do not believe that its error so tainted the jury's deliberations on Count II that a reversal of the defendants' convictions for bribing Mayor Ross is in order. The evidence concerning the two bribes was of such a nature that it could be easily compartmentalized by the jury and then considered independently by it under each separate count of the indictment. For example, the two bribes were entirely different in form. Serota received the bulk of his payments under the guise of a contract of sale for his apartment. Ross, on the other hand, was surreptitiously paid by the defendants. Moreover, the two bribes were separated in time. Ross was not even contacted by the defendants until after Serota's assistance had been secured. Consequently, we believe that there was little possibility that the jury relied on improper evidence in reaching its guilty verdict on Count II.

In any event, nearly all of the evidence concerning the defendants' dealings with Serota would have been admissible even if Count III had not been included in the indictment. The Serota transaction was an integral part of the defendants' scheme to obtain the variances needed for their project. Hence, evidence concerning it was clearly relevant to show the defendants' motive in approaching Ross with their proposition as well as their modus operandi. Any prejudice suffered by the defendants from the balance of this evidence was minimal and certainly does not entitle them to a new trial.





In the remainder of our opinion we will determine whether their convictions under Count II of the indictment can stand in light of their further assignments of error.

A. *Recusal*

Prior to trial, the defendants Diaco, Valentine, and Valentine Electric filed timely motions pursuant to 28 U.S.C. § 144 seeking to have the district judge disqualify himself on the ground that he was personally biased against them.[5] Each such motion was accompanied by the re-

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[5] Three months after the initial indictment in this prosecution was handed down, Diaco moved for the district judge's recusal. At the hearing on this motion, questions arose as to the timeliness of Diaco's motion and the good faith of his attorney's certificate. As a result of this latter issue, Diaco's attorney stipulated to additional facts not contained in his client's affidavit of bias. Thereafter, while indicating that the motion was not timely and subject to dismissal on that ground, the district judge denied the motion as being legally insufficient.

When the first indictment was later dismissed and superseded by the second, Diaco once again moved for the trial judge's disqualification on the basis of a new affidavit which contained the additional allegations previously omitted, but stipulated to by his counsel. Valentine and Valentine Electric also moved for recusal at this time and filed an affidavit essentially adopting all the allegations contained in that of Diaco. These motions were then denied as being legally insufficient.

After the third indictment, under which defendants were ultimately convicted, was returned, Diaco again moved for recusal on the basis of the papers previously filed by him. Although Valentine and Valentine Electric failed to file a formal motion in this regard, the trial judge treated their earlier motion as having

[Footnote continued on following page]

quired affidavit of bias from the movant as well as a certificate of good faith from his counsel of record. The trial judge, however, refused to recuse himself holding that the allegations contained in the affidavits were not sufficient to establish the requisite personal bias on his part. On appeal, the defendants contend that he erred in so doing.[6]

The affidavits of bias submitted by Diaco and Valentine may be summarized. Diaco and Valentine are identified as principals of Valentine Electric since its formation in 1958. The affidavits then go on to allege that between 1969-71 the trial judge, while serving as United States Attorney for the District of New Jersey, repeatedly and publicly singled out Valentine Electric as having underworld connections; that he invited competitors of Valentine Electric to bring any complaints against it to the attention of his office; and that he conducted vigorous investigations of the company's affairs. These investigations were highlighted by his office's 1970 prosecution of, among others, Anthony Boiardo, then owner of one third of Valentine Electric's stock and widely reputed to be an underworld figure, and Joseph Biancone, a Valentine employee, for acts of extortion both on and off the premises of the company. In addition, Diaco alleged that he himself

been renewed, and then denied all the motions seeking his disqualification.

In the instant appeal, then, we need only consider the legal sufficiency of the affidavits before the trial judge when he denied the motions for his recusal under the third indictment. Any claims as to the propriety of his actions at the hearing on the first motion for recusal have been rendered moot by the subsequent dismissal of the first and second indictments.

[6] The defendants other than Diaco, Valentine and Valentine Electric also assert that the district judge's refusal to recuse himself constitutes reversible error as to them even though they refused to join in such motions below. Their assertion does not constitute compliance with the statute. See 28 U.S.C. § 144.





had been called before a federal grand jury on two separate occasions and questioned about his relationship with Boiardo and the manner in which Valentine Electric obtained its contracts.

Both Diaco and Valentine, however, make a number of significant concessions in their affidavits. They concede that the district judge's statements were primarily directed against Boiardo who was generally regarded as the controlling figure in Valentine Electric and that Boiardo severed all connections with the company in 1970. Moreover, they admit that after Boiardo disassociated himself from the company and while the trial judge was still United States Attorney, a representative of his office informally advised a law firm, which was considering Valentine Electric as a potential client, that there was no longer any basis for believing that its principals were engaged in criminal activity.

The affiants insist, however, that these latter allegations demonstrate only a lack of criminal evidence, rather than a lack of prejudice against them. Hence, based on their allegations in their entirety, they conclude that the court was personally biased against Valentine Electric and against them because of their intimate connection with that company.

The basic rules of law governing the recusal of a trial judge for personal bias are well-settled. The mere filing of an affidavit of bias pursuant to 28 U.S.C. § 144 does not require a trial judge to disqualify himself from a particular case. *Behr* v. *Mine Safety Appliances Co.*, 233 F.2d 371 (3d Cir. 1956). Indeed, if the affidavit submitted is legally insufficient to compel his disqualification, the judge has a duty to preside. *See Simmons* v. *United States*, 302 F.2d 71 (3d Cir. 1962). Rather, a trial judge need only

recuse himself if he determines that the facts alleged in the affidavit, taken as true, are such that they would convince a reasonable man that he harbored a personal, as opposed to a judicial, bias against the movant. *United States* v. *Thompson*, 483 F.2d 527 (3d Cir. 1973).

After analyzing the defendants' affidavits under this standard, we are unable to say that the trial judge erred in refusing to disqualify himself. Neither Valentine nor Diaco make a single allegation indicating that the district judge ever manifested, by word or deed, any hostility, animosity, or, for that matter, any emotion whatsoever towards them personally. Rather, Diaco and Valentine base their belief that the district court could not preside at their trial in a fair and impartial manner entirely on his prior investigation of, and statements concerning, Valentine Electric and his prosecution of Boiardo and Biancone. However, allegations that the trial judge, during the course of his duties as United States Attorney, investigated, commented upon, and prosecuted some of the former principals of a company with which the defendants are connected do not, without more, establish that he was personally biased toward them as required by the statute. If anything, allegations of this nature merely evidence "an *impersonal* prejudice, [going] to the judge's background and associations *rather than his appraisal of the* [*movants*] *personally.*" *Parker Precision Products Co.* v. *Metropolitan Life Insurance Co.*, 407 F.2d 1070, 1077-78 (3d Cir. 1969) (emphasis added).

The status of Valentine Electric raises a somewhat more difficult problem in light of the fact that the dictrict judge both investigated it and made derogatory comments concerning it while serving as United States Attorney. However, while it is certainly conceivable that an individual may be prejudiced against a corporation such as



General Motors which has attained an identity that transcends the personalities of those involved in its management, we do not read the affidavits before us to suggest that the trial judge harbored any such bias towards Valentine Electric in the abstract. Rather, we think that his alleged words and deeds evidence nothing more than hostility toward Anthony Boiardo, the individual then reputed to be in control of the company. Indeed, the affiants themselves seem to acknowledge this when they state that they:

> "under[stood] that those statements were directed basically toward Mr. Boiardo who stood in the public eye according to [the trial judge] as the one who had infiltrated and controlled Valentine Electric."

The affidavits further allege, however, that Boiardo severed all connections with Valentine Electric in 1970, and that, thereafter, the United States Attorney's Office, under the trial judge's direction, advised a law firm that there was no longer any reason to believe that the company was engaged in criminal activity. Consequently, we believe that the affidavits do not establish a more substantial basis for recusal with respect to Valentine Electric, than they do for either Diaco or Valentine, its principals and sole remaining stockholders.

We therefore hold that the affidavits submitted by the defendants under § 144 fail to allege the requisite personal bias on the part of the trial judge, and that he committed no error in presiding at their trial. In reaching this conclusion, we emphasize that we have confined our analysis to the legal sufficiency of the defendants' affidavits of bias under § 144.

B. *Jury Selection*:

The defendants next challenge the procedures utilized by the district court in selecting the jury. Prior to trial, the defendants filed motions seeking a change of venue or vicinage, severance, and a dismissal of the indictment because of the extensive and allegedly prejudicial publicity given their case in the Newark, New Jersey area. Rather than moving the trial from Newark, the district court, pointing to an apparent absence of such publicity in the Trenton, New Jersey area, decided to select the jury from that vicinage, and, thereafter, sequester it during the trial in Newark. The court itself conducted the *voir dire* of the veniremen. In addition, in order to expedite the selection process so that the advantages secured by selecting the jury in Trenton would not be lost, it questioned the potential jurors, for the most part, as a group. Proceeding in this manner, the court succeeded in empaneling a jury in a single day.

While acknowledging that Rule 24, Fed. R. Crim. Proc., grants the district court considerable leeway as to the manner in which it conducts *voir dire*, the defendants contend that the selection procedure here adopted by the court was unfair. More specifically, they claim that the district court abused its discretion by (1) failing to examine each prospective juror individually as to his or her exposure to prejudicial pre-trial publicity; and (2) failing to explore adequately potential areas of juror bias to which the defendants had directed its attention. It should be noted, however, that the defendants do not contest the final composition of the jury selected.

On the issue of pre-trial publicity, the defendants argue that where, as here, extensive pre-trial publicity has been given a case, our decision in *United States* v. *Addonizio*, 451 F.2d 49 (3d Cir. 1972), requires a district





court to examine each prospective juror individually and outside the presence of the entire panel on the question of his or her exposure to such publicity. They contend that the district court's failure to conduct such an individualized examination under the circumstances of the instant case constitutes reversible error.

We disagree. In *Addonizio*, we recommended that a district court follow such a procedure only when, in its opinion, there existed a "significant possibility" that individual talesmen would be ineligible to serve because of their exposure to potentially prejudicial pre-trial publicity. Only by such an individualized examination, we reasoned, could the effects of such exposure on the juror's attitudes toward the impending trial be determined. However, even though the district court failed to follow our recommendations below, it did take measures to screen-out potential jurors who had been exposed to such publicity. Under the facts present here, those measures proved more than adequate to protect the defendants' interests in obtaining a jury unswayed by the publicity surrounding the case.

In the first place, the court wisely decided to select the jury from an area where pre-trial publicity concerning the case had been minimal. This alone significantly lessened the possibility that any of the prospective jurors would have had any pre-conceived notions about the trial.

Secondly, and more importantly, the defendants were in no way prejudiced by the end-result of the selection procedures utilized by the district court. At the outset of *voir dire*, the court asked the entire panel of 217 jurors whether any of them had read or heard anything about the case. Eighteen jurors responded affirmatively. These eighteen were then asked whether, as a result of what they had read or heard, they had formed an opinion as to the guilt or innocence of any of the defendants. Twelve of the eighteen indicated that they had done so and were excused

*sua sponte* by the court. The remaining six were then examined by the court as to their exposure to pre-trial publicity and they indicated that, despite such exposure, they could try the case in a fair and impartial manner.

Following the examination of the entire panel, groups of twenty-four prospective jurors were seated in the jury box and questioned by the court. The court once again asked each group whether any of its members had read or heard anything concerning the case. No jurors responded affirmatively other than the unexcused jurors who had previously done so. Of those six jurors, four were eventually excused for other reasons [7] and the remaining two were not seated. Hence, the court succeeded in empaneling a jury composed of individuals who had previously read or heard nothing about the case.

Under these circumstances, the defendants have little cause to complain over the district court's failure to conduct the individualized examination we recommended in *Addonizio*. That procedure is designed to enable both court and counsel to discern whether a venireman's prior exposure to publicity concerning the case would preclude him from sitting as a fair and impartial juror. However, here, every juror who indicated any exposure whatsoever was eventually excluded from the panel. This factor alone distinguishes this case from *Addonizio* where nine of the twelve jurors empaneled had read or heard something about the case prior to trial. Since none of the jurors selected below had been subjected to any publicity concerning the case, the defendants were not exposed to the particular danger the *Addonizio* procedure is designed to guard against.

We therefore find no error in the district court's

[7] It should be noted that these jurors were excused without the exercise of peremptory challenges by the defendants.





failure to conduct an individualized examination of prospective jurors as to their exposure to pre-trial publicity. Moreover, even if we were to find error, under the circumstances existing here, it would certainly be harmless and in no way entitle defendants to a new trial.

We turn next to the district court's alleged failure to explore adequately potential areas of juror bias. The defendants essentially make two arguments in this regard. First, they cite as error the district court's refusal to ask the prospective jurors all questions submitted by them directed at exposing such bias. Second, they assert that the prospective jurors should have been examined individually as to potential bias on their part. We will consider these arguments in order.

Prior to the selection of the jury, the defendants jointly submitted proposed questions aimed at discovering a juror's attitudes in three areas, which, they claim, had a direct bearing on the merits of the case. Those areas were the wealth of the defendants, politicians and money, and the fact that Serota had, in a sense, "sold out" those opposing the project's construction. The defendants maintain that the district court's refusal to ask these questions, or anything similar to them, made it impossible to discover whether such prejudices existed, and if so, to excise them from the trial.

At the outset we note that the latter two areas of potential bias primarily concern Serota and the defendants concede as much in their briefs. Consequently, the remaining defendants have little cause to complain about the district court's alleged failure to ask questions directed at those areas.

We need not, however, rely on this factor in reaching our decision. As already noted, Rule 24 F.P. Crim. Proc., grants the district court broad discretion as to the manner in which it conducts *voir dire*, subject only to the es-

sential demands of fairness. This discretion certainly includes the decision as to what questions should be asked when the court itself decides to examine the prospective jurors so long as inquiries relevant to the discovery of actual bias are not omitted. *See United States* v. *Wooton*, 518 F.2d 943 (3d Cir. 1975). Consequently, although Rule 24 does allow counsel to submit proposed questions to the court, it does not assure him that those questions will be asked.

Our examination of both the questions asked the panel and the instructions given it indicates that, despite defendants' argument to the contrary, the district court did cover, in substance, all the areas which the defendants wished to explore. Hence, this is not a case where the court entirely omitted inquiries relevant to the discovery of actual bias. *See United States* v. *Napoleone*, 349 F.2d 350 (3d Cir. 1965). Moreover, in some instances, the questions and instructions of the court were even more specific, and, as a result, more probing, than those requested by the defendants. Under these circumstances, we find no abuse of discretion in the district court's failure to pose to the jury all proposed questions submitted by the defendants.

Whether or not the district court erred in refusing to conduct an individual *voir dire* as to potential juror prejudice raises a somewhat more serious problem. For obvious reasons, an individualized examination is the most effective manner by which to discover latent prejudices on the part of a particular juror. Indeed, under certain circumstances, it may be the only means of assuring a defendant his right to an impartial jury.

At the same time, however, it is an extremely time consuming process which, when unnecessary, must be foregone in the interests of judicial economy. It is for just such reasons that Rule 24 grants the district courts such





wide latitude in these matters. It leaves to their sound discretion the duty to forge a reasonable accommodation between the interests in obtaining an unbiased jury, and in doing so as expeditiously as possible. *Judicial Conference Committee On The Operation of the Jury System, The Jury System In The Federal Courts*, 26 F.R.D. 409, 465-66.

On the record before us, we are unable to say that the balance struck by the district court constituted an abuse of that discretion. In the instant case, the need to empanel the jury as quickly as possible was particularly accute. Apart from the normal considerations of judicial economy, an expeditious selection also served the defendants' interests in obtaining an unbiased jury. Prejudicial pre-trial publicity had already forced the court to select the jury from the Trenton, rather than the Newark, area. A long, drawn-out *voir dire* would have allowed potential jurors to be subjected to the inevitable publicity in the Trenton area engendered by the selection there, and thus defeated the purpose of the move. Hence, an expeditious selection was the best available method of insulating prospective jurors from exposure to such publicity.

Nor can we say that the procedure followed by the district court unduly restricted *voir dire* so as to deny the defendants their right to an impartial jury. None of the potential areas of bias cited by the defendants were so serious or pervasive that anything short of an individual *voir dire* would have failed to ferret them out. *Cf., United States* v *Stark*, 515 F.2d 112 (3d Cir. 1975). In sum, we are convinced upon a review of the record that the *voir dire* was effective in obtaining an unbiased jury. We therefore find no error in the district court's refusal to conduct an individual *voir dire* as to potential juror bias.

C. *Evidence of Prior Crimes*:

Both prior to and at the trial itself, the defendants vigorously opposed the introduction into evidence of testi-

mony by the unindicted co-conspirator Sutton concerning the previous embezzlement of IFC funds by Dansker, Haymes, and Orenstein, the IFC defendants, on the grounds that it constituted inadmissible evidence of prior crimes.[8] The district court overruled these objections and permitted Sutton to testify on these matters. However, it instructed the jury that this evidence was only to be considered against the IFC defendants and for the limited purpose of determining what, if any, relationship existed between them and Sutton.[9] On appeal, the defendants renew their objections to the admission of this evidence contending (a) that it was irrelevant for any purpose other than to establish a propensity to commit crimes on the part of the IFC defendants; and (b) that even if relevant for some legitimate purpose, its probative value was far outweighed by its prejudicial impact.

In substance, Sutton testified that the IFC defendants had utilized the financing agreement which required IFC to provide him with the funds needed to purchase properties for the Fort Lee project to divert more than $5,000,000 in IFC funds to their own use. Allegedly, the scheme proceeded in the following manner. Sutton would advance monies from time to time to the IFC defendants for their personal use. At the next property closing for the project, the acquisition cost would be inflated to reflect the monies previously turned over to the IFC defendants. IFC would then pay Sutton this inflated figure. In this manner, the IFC defendants succeeded in concealing

[8] Although this evidence primarily affected the IFC defendants, the non-IFC defendants also challenge its admissibility on the ground that they were unduly prejudiced by its introduction.

[9] In its oral opinion permitting the introduction of this evidence, the district court also found it relevant to establish a *modus operandi* and a motive on the part of the IFC defendants.





their diversion of corporate funds under the guise of capital expenditures for the project.

In this Circuit, the law concerning evidence of prior crimes is well-established.[10] As we stated in *United States* v. *Stirone*, 262 F.2d 571 (3d Cir. 1958); *rev'd on other grounds*, 361 U.S. 212 (1960):

> "Evidence of other offenses may be received if relevant for any purpose other than to show a mere propensity or disposition on the part of a defendant to commit a crime."
>
> 262 F.2d at 576

Of course, even when such evidence is otherwise admissible under this standard, the district court may, in an exercise of its sound discretion, exclude it if it determines that "the probative value of such evidence is substantially outweighed by the risk that its admission will create a substantial danger of undue prejudice." 262 F.2d at 576-77.

After analyzing Sutton's challenged testimony under the applicable rules of law, we find no error in the district court's admission of it into evidence. Although his testimony indicated prior criminal behavior on the part of the IFC defendants, it was clearly relevant to far more than the defendants' mere propensity to commit crime. In the first place, it cast light, as the district court correctly determined, on the relationship, if any, existing between Sutton and the IFC defendants. Since the government's case against the IFC defendants rested largely on Sutton's testimony, both the existence and the nature of this relationship were of critical importance to Sutton's credibility. In addition, the background information pro-

[10] At the time of the proceedings below, the new Federal Rules of Evidence were not yet in effect. However, we note that new Rule 404(b), dealing with evidence of prior crimes, is substantially the same as that previously applied in this Circuit.

vided by this testimony enabled the jury to better understand Sutton's role in the bribery scheme as well as his testimony as a whole.

Secondly, this testimony helped establish a modus operandi further implicating the IFC defendants in the subsequent bribery scheme. Allegedly, the IFC defendants were to raise the funds necessary for at least the Ross bribe through the same "property closings" that they had previously used to raise money for their own benefit..

Finally, this evidence was relevant to show a motive on the part of the IFC defendants for their alleged attempt to secure the needed zoning variances through bribery. If the IFC defendants had indeed diverted large sums of corporate money to their own use under the pretense of property acquisitions for the project, a large project was essential to justify those expenditures. However, the Fort Lee zoning ordinances posed a formidable obstacle to the construction of that large project. Hence, it is not inconceivable that the IFC defendants would resort to bribery in order to obtain zoning variances permitting the large project needed to cover up their previous unlawful activities.

Nor do we believe that the prejudicial impact of this evidence "substantially out-weighed" its probative value so as to require its exclusion.[11] To be sure, the possibility always exists that a jury may misuse evidence which is introduced for a limited purpose. However, here, the district court took more than adequate measures to protect against such misuse. Rather than allowing Sutton to de-

[11] In contesting the admissibility of this evidence, the non-IFC defendants argue that its prejudicial impact necessarily "spilled over" against them. Although we hold that this prejudice, if any, was insufficient to require the exclusion of this evidence, whether it entitled them to a severance from the IFC defendants is a separate issue which we will consider later.



tail every transaction by which the IFC defendants had embezzled corporate funds, the court only permitted him to describe the mechanics of their scheme through four illustrative examples. Moreover, at no time was there any suggestion to the jury that these transactions were criminal. Indeed, prior to Sutton's testimony in this regard, the district court emphatically instructed the jury that the indictment did not charge the defendants with committing a crime as a result of these transactions. Finally, the court cautioned the jury time and time again that this evidence could only be considered against the IFC defendants, and against them, for only a limited purpose.

We are therefore convinced that the district court committed no abuse of its considerable discretion in permitting the introduction of this evidence.

III. *Issues Raised By Valentine and Valentine Electric*:

A. *Restrictions Placed on the Cross-Examination of Sutton*:

While conceding, as they must, that there was no complete denial of their right to cross-examine the unindicted co-conspirator Sutton, the defendants Valentine and Valentine Electric contend that this cross-examination was unduly restricted by certain rulings of the district court. Of the four alleged instances of error,[12] only two merit our discussion: (1) whether the district court abused its

[12] We find no merit in defendants' argument that the district court unduly restricted their cross-examination of Sutton by refusing (a) to permit the introduction into evidence of certain documents during his cross-examination; and (b) to require the government to disclose the last name of Tony C. and to produce the grand jury testimony of Tony Citrupi, Ruth Golden and Harold Golden pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963). To the extent that the defendants other than Serota press his argu-

[Footnote continued on following page]

discretion in restricting the cross-examination of Sutton as to his previous plea of guilty; and (2) whether the district court erred in refusing to turn over to the defendants statements made by Sutton which were contained in his pre-sentence report.

Prior to trial, Sutton had been permitted to plead guilty to a one count information charging him with conspiracy to violate, among other things, the Travel Act and a section of the Internal Revenue Code, entitled, "Fraud and False Statements, Declarations Under Penalty of Perjury", 26 U.S.C. § 7206(1). The charged conspiracy, insofar as it is related to the Travel Act, dealt with the bribes of Ross and Serota. With respect to the second substantive offense mentioned, the charge had its basis in the IFC defendants' prior diversions of corporate funds in that Sutton was accused of aiding them in filing false tax returns which did not reflect those monies. The maximum penalty facing Sutton as a result of his plea to this single count information was a five year term of imprisonment and a $10,000 fine. Of course, had he been charged with and convicted of the various substantive offenses described in the information he could have received a much harsher punishment.

On cross-examination of Sutton, the attorney for Serota [13] sought to introduce the title of the tax statute which Sutton had been convicted of conspiring to violate. His stated purpose in doing so was to establish Sutton's

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ments that the district court erred in permitting Sutton to have before him, during cross-examination, documents by which he was being impeached, and in rehabilitating Sutton's testimony during cross-examination, we find them equally devoid of merit.

[13] The attorney for Valentine and Valentine Electric indicated his intent to introduce the title of the tax statute if Serota's counsel failed to do so.





knowledge that he had been permitted to plead to a single conspiracy to violate a number of federal statutes when he could have been charged separately with the substantive crimes set out in the information. However, it is also clear that he expected that Sutton's mere plea to a statute bearing that title would reflect adversely on his credibility.

This attempt to introduce the title of the tax statute was vigorously opposed by both the government and the attorney for the IFC defendant Dansker. The government took the position that the introduction of the title alone was misleading since Sutton had not pleaded guilty to filing a false tax return himself, but only to aiding the IFC defendants in doing so. Consequently, it manifested its intent to elicit that fact on redirect if the title to the statute was admitted. Counsel for Dansker, on the other hand, objected to any reference to a crime which might suggest that his client had committed an offense other than that charged in the indictment. Any such reference, he argued, would prejudice his client beyond repair.

Faced with these competing interests among the defendants, the district court refused to permit Serota's counsel to establish the name of the offense. In making this ruling, the court obviously agreed with the government that the title of the statute by itself was misleading under the circumstances and feared the inevitable prejudice to the IFC defendants which would occur if the offense was placed in its proper perspective. However, it did not completely foreclose all inquiry into Sutton's prior guilty plea. The defendants were allowed to establish, if they so desired, Sutton's realization that he could have been charged with far more than a single conspiracy. They were also permitted, and did explore, the fact that Sutton had pleaded guilty to a lesser offense expecting leniency in exchange for his plea and his cooperation with the government. Finally, counsel for Serota was al-

lowed to quote extensively from the information insofar as it pertained to offenses other than the tax violation in an attempt to demonstrate an inconsistency between Sutton's guilty plea and his testimony at trial.

On appeal, Valentine and Valentine Electric contend that the district court's refusal to permit the introduction of the tax statute's title constitutes reversible error. The mere fact that Sutton had been convicted of a crime of that nature, they argue, had a serious and direct bearing on his credibility. Hence, while acknowledging that the district court's motives may have been "commendable", they assert that its exclusion of any reference to the statute's title frustrated the effectiveness of their cross-examination of a key prosecution witness and thus violated their right to conduct a meaningful cross-examination.

We disagree. The district court has wide discretion in determining the permissible scope of cross-examination. *E.g.*, *United States* v. *Greenberg*, 419 F.2d 808 (3d Cir. 1969). Although normally the title of a prior crime committed by a witness may be elicited during his cross-examination in order to undermine his credibility, *Beaudine* v. *United States*, 368 F.2d 417 (5th Cir. 1966), we do not believe that the district court exceeded that discretion on the record before us.

In the first place, the mere fact that Sutton had pleaded guilty to a statute bearing that title would have been of little significance in discrediting his testimony. Any initial adverse impact on his credibility would have been severely diminished when his true role in the offense was subsequently exposed by the government. At the same time, the IFC defendants would have been unavoidably prejudiced when Sutton's offense was placed in its proper perspective. Under these circumstances, we believe that the district court wisely acted to preserve the IFC defendants' interests in obtaining a fair trial.





Moreover, we do not believe that the balance struck by the district court unduly restricted the non-IFC defendants' right to conduct a meaningful cross-examination. The evidence before the jury was more than sufficient for it to conduct a "discriminating appraisal" of Sutton's credibility. *See United States* v. *Mallah*, 503 F.2d 971 (2d Cir. 1974). The jury was fully aware of his prior conviction, his expectations of leniency and his previous unlawful activities. In addition, his credibility was repeatedly and severely assailed from every conceivable angle over a cross-examination which covered more than 1,100 pages of a 2,600 page transcript. In this context, we find no error in the district court's decision to exclude a few questions as to the title of a tax statute which were, at best, of limited probative value in discrediting Sutton's testimony. To the extent that any defendant other than Valentine and Valentine Electric seeks to advance this argument we find it equally lacking in merit.

We turn next to the defendants' contentions concerning statements by Sutton contained in his pre-sentence report. During the course of Sutton's cross-examination, counsel for Serota, in a motion joined in by the attorney for Valentine and Valentine Electric, called for the production of any recorded statements Sutton may have made to the probation department as well as the pre-sentence report prepared by it. In making this motion, he relied on both *Brady* v. *Maryland*, 373 U.S. 83 (1963) and the Jencks Act, 18 U.S.C. § 3500. After obtaining a copy of the report from the probation department and reviewing it *in camera*, the court determined that, although it contained a typewritten statement signed by Sutton, neither it nor the statement were producible under either the Jencks Act or *Brady*. With respect to the Jencks Act the court added that, as a matter of policy, it did not believe that statements contained in pre-sentence reports were within its purview.

In maintaining that the district court erred in refusing to turn over the statement by Sutton contained in his pre-sentence report, the defendants seem to have abandoned the *Brady* argument pressed below. Rather, they appear to rely totally on the Jencks Act in asserting that the statement was subject to production.

> The Jencks Act provides in pertinent part:
> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness *in the possession of the United States* which relates to the subject matter as to which the witness has testified." (emphasis added).

In speaking of statements "in the possession of the United States", we understand the statute to require production only of statements possessed by the prosecutorial arm of the federal government. *See Augenblick* v. *United States*, 377 F.2d 586, 597-98 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969); *United States* v. *Ehrlichman*, 389 F. Supp. 95 (D.D.C. 1974). Hence, such statements possessed by, for example, the F.B.I. or a United States Attorney must be turned over to the defense on proper motion.

A pre-sentence report and statements contained therein, however, are not within the possession of the prosecution. Indeed, the prosecution has access to them only under limited circumstances, Fed. R. Crim. Proc. 32(c). Rather, a pre-sentence report is a confidential document prepared at the direction of the court solely for its use in imposing sentence. The probation department thus acts as an arm of the court in such preparation. *United States* v. *Greathouse*, 188 F. Supp. 765 (M.D. Ala., N.D. 1960). We therefore find no error in the district court's refusal to turn over Sutton's statement contained in his pre-sentence report. Of course, to the extent that any defendants other than Valentine and Valentine Electric press this argument the same result applies.





B. *Severance*:

Valentine and Valentine Electric next complain of the district court's failure to grant them a severance below. Prior to trial, the district court denied their motion brought pursuant to Rule 14, Fed. R. Crim. Proc., for a severance from IFC and the IFC defendants. They now contend that they were unduly prejudiced during the joint trial which followed by (a) the evidence admitted against the IFC defendants concerning their prior diversion of corporate funds; and (b) the restrictions placed by the court on their cross-examination of Sutton as to his prior guilty plea in order to protect the interests of the IFC defendants. They assert that the district court's failure to grant them a severance at the appearance of such prejudice deprived them of their right to a fair trial.

We find no merit in this argument. A motion for severance is addressed to the sound discretion of the district court. On appeal, the district court's denial of such a motion will not be disturbed absent an affirmative showing that the court's ruling resulted in such prejudice to the moving party that it amounted to an abuse of discretion. *United States* v. *DeLarosa*, 450 F.2d 1057 (3d Cir. 1971). On the record before us, we see nothing close to the amount of prejudice needed to overturn the district court's decision.

We turn first to their contentions concerning the evidence of the IFC defendants' prior misconduct. In substance, Valentine and Valentine Electric argue that this evidence was so complex and so damning that its prejudicial impact necessarily spilled over against them. Since

they would have not been exposed to such prejudice in a separate trial, they assert that the district court erred in failing to grant them a severance.

We cannot agree. A defendant is not entitled to a severance merely because the evidence against a co-defendant is more damaging than that against him. If that were the case, a joint trial could rarely be held. Rather, in determining whether disparate proofs require a severance, the proper inquiry is whether the evidence is such that the jury cannot be expected to "compartmentaiize" it and then consider it for its proper purposes. *United States* v. *DeLarosa*, 450 F.2d at 1065.

In the instant case, we are convinced that the jury would have experienced little difficulty in "compartmentalizing" the evidence concerning the IFC defendants' prior diversion of corporate funds. Not only did this evidence implicate the IFC defendants alone, it related to a time period prior to the entry of Valentine and Valentine Electric into the bribery scheme. This chronological difference certainly aided the jury in marshalling the evidence admissible against each defendant. Moreover, this evidence concerned activities of the IFC defendants which were far different in kind than anything engaged in by Valentine and Valentine Electric during the bribery plot. Hence, the jury should have had little problem in distinguishing this evidence from that properly admitted against them. Finally, the court emphatically cautioned the jury time and time again that this evidence was only to be considered against the IFC defendants. In the light of these frequent and clear instructions, we can hardly assume that the jury nevertheless considered this evidence against Valentine and Valentine Electric. *See United States* v. *Barrow*, 363 F.2d 62, 67-68 (3d Cir. 1966).





Likewise, we do not believe that the restrictions placed on the cross-examination of Sutton so prejudiced Valentine and Valentine Electric that a severance was required. Once again, the defendants' argument in this regard focuses on the district court's frustration of their attempt to establish the title of the tax satute which Sutton had been convicted of conspiring to violate. To be sure, the defendants could have elicited this information in a separate trial. However, in that separate trial, the government would have certainly been permitted to place Sutton's offense in its proper perspective, thus diminishing its prejudicial impact on his credibility. Moreover, as we previously indicated, the defendants were allowed to conduct a more than adequate cross-examination of Sutton. Under all the circumstances, we do not believe that the defendants' inability to establish a fact of such limited probative value gave rise to such a degree of prejudice that a severance was mandated.

We therefore hold that the district court committed no abuse of discretion in failing to sever Valentine and Valentine Electric from the IFC defendants. We also reject any claim by the defendant Diaco that he was entitled to a severance on these same grounds.

C. *Comment on Valentine's Failure to Testify*:

During the course of his summation, the prosecutor made during the following statement:

> "Then at 7:25 that evening from Mr. Serota's own home he places a telephone call to Valentine Electric Company, a four-minute conversation. If this is so honest and above board, and unassailable, why is Mr. Serota and Mr. Valentine talking the night of the 16th? What purpose?

*APPENDIX A—Opinion of the United States Court of Appeals for the 3rd Circuit (June 2, 1976)*

*Counsel has given you no reason, no explanation for the relationship between Mr. Serota and Mr. Valentine.*" (emphasis added).

At that point, the attorneys for Serota and Valentine moved for a mistrial on the ground that the prosecutor's statement constituted a comment on their client's failure to take the stand in violation of their fifth amendment rights. The district court denied the motion. However, it immediately instructed the jury that the defendants had no obligation to testify in their own behalf and that no adverse inferences could be drawn from their failure to do so.

On appeal, Valentine argues that the court erred in denying his motion for a mistrial. He contends that the obvious purpose of the prosecutor's remark was to call attention to his failure to take the stand since the "explanation" called for by the prosecutor could only have been provided by his own testimony. Moreover, he maintains that this comment was so grossly prejudicial that its impact could not be vitiated by the district court's curative instructions.

In determining whether a prosecutor's remark constitutes an improper comment on an accused's failure to take the stand in his own behalf, the proper test is "whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily tike it to be a comment on the failure of the accused to testify". *United States* v. *Chaney*, 446 F.2d 571, 576 (3d Cir. 1971). After carefully examining both the contents of the prosecutor's statement and the context in which it was made, we are convinced that it was neither intended as such a comment nor of such a nature that the jury would necessarily construe it in that fashion.



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We think it clear that the prosecutor was merely highlighting the failure of defense counsel, in their summations, to challenge critical evidence against their clients. The fact that Valentine and Serota had been conferring with one another at that particular time was certainly significant since it tended to establish a relationship between them during the period of the alleged bribery scheme and thus sustantiated Sutton's testimony. However, while they offered explanations for much of the evidence in the case, neither Serota's nor Valentine's counsel made any effort to explain away this conversation in their closing arguments. In pointing out this failure on the part of defense counsel in his summation, the prosecutor was well within the bounds of legitimate advocacy. *E.g., United States* v. *Day*, 384 F.2d 464 (3d Cir. 1967); *United States* v. *Joyner*, 492 F.2d 650 (D.C. Cir. 1974).

In any event, the district court took more than adequate measures to protect against any possible prejudice to Valentine resulting from this single remark in the prosecutor's lengthy, but controlled, summation. Its immediate cautionary instructions insured that no juror would misconstrue the prosecutor's statement as an adverse comment on Valentine's failure to testify.

We therefore find no error in the district court's refusal to grant a mistrial on the ground that the prosecutor had improperly commented on Valentine's failure to take the stand in his own behalf.

IV. *Issues Not Passed On By The District Court*:

A. *Exclusion of Newark Area Residents from the Jury*:

Prior to trial, defendant Diaco, along with a number of other defendants, moved for a dismissal of the indictment or, in the alternative, a change of venue or vicinage because of the allegedly adverse publicity given this case

in the Newark area. As previously noted, the district court decided to select the jury from the Trenton area in response to the alternatives in this motion. However, in doing so, it made no findings as to whether the alleged publicity precluded a fair trial before a Newark jury. Rather, the requested change in vicinage was apparently granted to insure that no issue concerning such publicity would thereafter arise.

Diaco now claims that the adverse publicity which motivated his request for a change in vicinage was generated by the government. But for this publicity, he maintains, he would have been tried before a jury composed of residents of the Newark area, the vicinage in which the alleged crime occurred. Hence, he argues that the government, through this publicity, effectively excluded Newark area residents from the venire, and thus denied him his sixth amendment right to be tried by a jury composed of a fair cross-section of the community.

In order to resolve Diaco's claim, findings as to both the nature and source of such publicity in the Newark area would be necessary. However, such findings are totally absent on the record before us. Moreover, in pressing this argument in this Court, Diaco has failed to point us to a single record reference—and our independent examination of the record discloses none—indicating that he raised this objection below. Accordingly, we can only conclude that this argument was not presented to the district court. Since it appears that this claim is now raised for the first time and that findings necessary to provide the factual predicate for its resolution were neither sought nor made in the district court, further consideration of Diaco's claim is unnecessary. *See Government of the Virgin Islands* v. *Gereau*, 502 F.2d 914, 937 (3d Cir. 1974). This argument meets the same result to the extent it is put forward by any defendant other than Diaco.





B. *Denial of Haymes' Right to Counsel of His Choice*:

During the pre-trial proceedings, a question arose as to the propriety of Haymes' attorney's continued representation of his client. Haymes' attorney had previously served as counsel for IFC and, in that capacity, apparently attended several meetings between Sutton and the IFC defendants. The government felt that as a result of his presence at those meetings he might possibly be called as a witness during the upcoming trial.

Upon learning of this problem, the district court directed all counsel to submit their positions on the issue in letter form. The responses were not particularly enlightening since the government merely reiterated its concern over Haymes' attorney's status as a potential witness while counsel for Haymes' co-defendants essentially indicated that without further information they could take no position on the matter. Haymes' attorney, on the other hand, manifested his intent to remain in the case unless directed to do otherwise.

Thereafter, the court held an *in camera* hearing to further consider the issue. This hearing concluded with an order directing the government to prepare a delineation setting forth any anticipated testimony of Sutton relevant to the matter so that Haymes' attorney could make an informed decision as to the propriety of his continued participation in the case. However, before this delineation could be prepared, Haymes' attorney requested permission to withdraw with the approval of his client. The court granted this application nearly four months prior to the commencement of trial.

Haymes now contends that the actions of both the district court and the government effectively "forced" his attorney out of the case and thus denied him his

sixth amendment right to counsel of his choice.[14] However, no factual support for this contention appears on the record before us. Rather, the record merely indicates that the court began investigating a potential conflict of interest problem bearing on the propriety of Haymes' attorney's continued representation of his client, and that before this matter could be resolved, Haymes' attorney voluntarily withdrew from the case with the consent, albeit reluctant, of his client. Because of this voluntary withdrawal, the district court was never called upon to determine whether the alleged conflict of interest was such that it necessitated the withdrawal of Haymes' attorney or what consequences a withdrawal under those circumstances would have on Haymes' right to counsel of his choice. Since it thus appears on this record that the voluntary withdrawal of counsel prevented his sixth amendment claim from ever materializing in the district court, we decline to grant it any further consideration.

C. *Brady Claim re*: *James Silver*:

During the course of both pre-trial proceedings and the trial itself, the defendants made repeated motions pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), seeking the disclosure of any exculpatory information in the possession of the government. In response to these repeated requests, the government, acknowledging its "continuing duty" under *Brady* to provide the defense with such information, represented that it had discharged such obligation. Indeed, it turned over a great deal of material. In addition, the district court accepted the prosecution's representations with respect to its *Brady* obligations.

[14] To the extent that Haymes asserts that the district court erred in refusing to grant him a severance on this basis, we find no merit in his argument.





The defendants now contend that the government violated its *Brady* duties by failing to disclose to them the existence of one James Silver and the contents of communications made by him to representatives of the F.B.I. and the United States Attorney's Office for the District of New Jersey. The defendants assert that this information, which was in the government's possession prior to trial, would have materially aided them in discrediting the testimony of Sutton, the government's key witness. The government, on the other hand, while admitting that such information was in its possession, vigorously argues that it was not the subject matter of *Brady* production, and even if so, that its failure to disclose it to the defendants was harmless.

No *Brady* claim concerning Silver, however, was presented to the district court during either the trial or the post-trial proceedings. This claim was raised for the first time in a motion filed with this Court seeking the disclosure of all documentary evidence concerning Silver in the government's possession. The government responded to this motion by filing the requested materials *in camera* with this Court. After examination, we directed that it be turned over to the defendants in order that they might determine whether to pursue their claim. Thereafter, these documents became the subject matter of oral argument before this Court and we permitted counsel to submit post-argument briefs in support of their positions.

After due consideration, we find it inappropriate to resolve defendants' *Brady* claim in the first instance. The defendants allegations concerning Silver, if true, are relevant to the establishment of cause for a new trial. As such, they should be first presented to the district court on an appropriate Rule 33, Fed. R. Crim. Proc., motion. Of course, our decision in this response is without prej-

*APPENDIX A—Opinion of the United States Court of Appeals for the 3rd Circuit (June 2, 1976)*

udice to any action which the defendants may wish to take in the district court. And, since we decline to pass on this matter, we express no opinion on the merits of defendants' *Brady* claim. *United States* v. *McCrane*, 527 F.2d 906, 914 (3d Cir. 1975).

We have considered all other contentions raised by the defendants and find them without merit.[15]

Accordingly, the judgments of conviction of all defendants under Count III of the indictment will be reversed and this case remanded to the district court with directions to enter judgments of acquittal for the defendants on that count. The defendants' convictions under Count I will be vacated and the cause remanded for further proceedings not inconsistent with this opinion. The judgments of conviction on Count II will be affirmed.

[15] These contentions include the government's alleged *Brady* violation in refusing to disclose, prior to trial, any testimony of Sutton that was the basis for the second indictment in this prosecution which contradicted the allegations contained in the third indictment.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*



## APPENDIX B—Sur Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 75-1690/91

UNITED STATES OF AMERICA,

—v.—

NORMAN DANSKER, et al.,
ANDREW VALENTINE and VALENTINE ELECTRIC COMPANY,
*Appellants.*

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

COLLINS J. SEITZ
Judge

Dated: July 7, 1976

## APPENDIX B-1—Sur Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-1686

UNITED STATES OF AMERICA,

—v.—

NORMAN DANSKER, et al.,
JOSEPH DIACO,

*Appellant.*

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

COLLINS J. SEITZ
Judge

Dated: July 7, 1976



## APPENDIX C—Order of Court of Appeals staying the certified judgment in lieu of formal mandate

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 75-1690 & 75-1691

UNITED STATES OF AMERICA,

—VS.—

NORMAN DANSKER, JOSEPH DIACO, STEVEN HAYMES, WARNER NORTON, DONALD ORENSTEIN, NATHAN L. SEROTA, ANDREW VALENTINE, INVESTORS FUNDING CORPORATON OF NEW YORK, VALENTINE ELECTRIC COMPANY,

ANDREW VALENTINE, Appellant in No. 75-1690
VALENTINE ELECTRIC, Appellant in No. 75-1691

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until August 6, 1976.

COLLINS J. SEITZ
Chief Judge

Dated: July 15, 1976

## APPENDIX D—Relevant Statutes

18 U.S.C. § 1952.

Interstate and foreign travel or transportation in aid of racketeering enterprises.

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."





28 U.S.C. § 144

Bias or prejudice of judge.

"When ever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

28 U.S.C. § 455

Disqualification of justice, judge, magistrate, or referee in bankruptcy.

"(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer

with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.



(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

Nos. 76-158, 76-159 AND 76-334



# In the Supreme Court of the United States

OCTOBER TERM, 1976

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ANDREW VALENTINE AND VALENTINE ELECTRIC COMPANY, INC., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

JOSEPH DIACO, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

NORMAN DANSKER, STEVEN HAYMES, AND DONALD ORENSTEIN, PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

ROBERT H. BORK,
*Solicitor General,*

RICHARD L. THORNBURGH,
*Assistant Attorney General,*

SIDNEY M. GLAZER,
ROBERT H. PLAXICO,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

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## CITATIONS

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*v.*

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINION BELOW**

The opinion of the court of appeals[1] is reported at 537 F. 2d 40 (Pet. App. 1a-46a).

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[1]All citations to the court of appeals' opinion refer to the appendix in No. 76-334. "Dansker Pet." refers to that petition, "Val. Pet." refers to No. 76-158, and "Diaco Pet." refers to No. 76-159. "Tr." refers to the transcript of the trial.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 67a-68a), was entered on June 2, 1976. Petitions for rehearing were denied on July 7, 1976. Petitioners in Nos. 76-158 and 76-159 filed petitions for a writ of certiorari on August 5, 1976. The time for filing the petition in No. 76-334 was extended by Mr. Justice Brennan until September 3, 1976 (see Pet. App. 71a), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

Petitioners participated in a scheme to obtain zoning variances. They were convicted under the Travel Act on two substantive counts—based on bribery of a community spokesman opposed to the variances and a local official, respectively—and on a conspiracy count based on an agreement to bribe both. The court of appeals reversed the convictions for bribery of the spokesman on the ground that it was not a crime. It reversed the conspiracy convictions because the jury might have found an agreement to bribe only the spokesman, a non-crime. However, it affirmed the convictions for bribery of the official.

The questions presented are:

1. Whether the court of appeals properly affirmed petitioners' convictions for bribery of the official.

2. Whether the trial judge should have recused himself because, while United States Attorney, he had investigated a company involved in the scheme in connection with other offenses.

## STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiracy to violate the Travel Act, 18 U.S.C. 1952, by



bribery in violation of New Jersey law (count I), and with substantive violations of the Act consisting of the bribing of Burt Ross, the Mayor of Fort Lee, New Jersey (count II) and the bribing of Nathan Serota, vice-chairman of the Fort Lee Parking Authority (count III). The individual petitioners were each sentenced to concurrent five-year prison terms, and all petitioners were fined $10,000 on each count. The court of appeals affirmed the convictions on the Ross bribery count but reversed the convictions on the Serota bribery, and the conspiracy counts (Pet. App. 1a-46a).

The evidence is set forth in some detail in the opinion of the court of appeals (Pet. App. 3a-8a). In 1971, Arthur Sutton began acquiring real estate in Fort Lee, New Jersey, for commercial development. In 1972, petitioners Dansker, Haymes, and Orenstein, officials of Investors Funding Corporation (IFC), agreed on IFC's behalf to assist Sutton's project by advancing the funds to be paid to sellers when acquisitions were made (VI Tr. 1308-1320). The Sutton-IFC group wanted to build a huge shopping complex on the property, but much of the land was zoned non-commercial. Accordingly, in December 1973 Sutton and Dansker petitioned the Fort Lee Board of Adjustment for a zoning variance (VI Tr. 1332, 1345; Pet. App. 4a). By March 1974, the Board began hearings on the project. Meanwhile, IFC was in serious difficulty. It was unable to meet its contractual commitments to those from whom Sutton had purchased property; while Orenstein sometimes was able to negotiate extended payment schedules, this resulted in increased interest charges and, in some instances, higher acquisition costs (VI Tr. 1347-1351).

In the meantime, strong public opposition to the rezoning was voiced, headed by co-defendant Serota, vice-chairman of the Fort Lee Parking Authority, who resided in a condominium located near the proposed project. He paid

for opposition advertisements in local papers, organized and financed a slate of opposition candidates for the local Borough Council, and organized lobbying efforts directed at the Board of Adjustment. By April 1974, it became apparent that the zoning petition would fail (Pet. App. 4a-5a).

At that time, petitioner Valentine, president of Valentine Electric Company, approached Sutton and offered to assist in securing approval of the variance in return for the electrical contract for the proposed complex. Valentine told Sutton that he had assisted others in securing favors from the Mayor of Fort Lee, Burt Ross. When Sutton called Orenstein about this, he was told to pursue the matter (VI Tr. 1368-1372). Sutton then met again with Valentine, who stated that approval of the zoning variance could be obtained by purchasing Serota's apartment for an inflated price and by paying off the mayor (VI Tr. 1380-1381). Sutton discussed this proposal with petitioners Dansker and Orenstein; they approved and agreed to finance it (VI Tr. 1382-1393; Pet. App. 5a).

Valentine thereupon contacted Serota and worked out an arrangement by which IFC was to purchase Serota's $500,000 condominium apartment for $900,000 and pay Serota an additional $200,000 in cash at the closing. In return, Serota agreed to cease opposition to the project and to support its approval in a modified form. The sale to Orenstein's brother-in-law was consummated on May 15, 1974. The contract incorporated Serota's agreement to terminate his opposition but did not mention the additional $200,000 payment (Pet. App. 5a-6a).[2]

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[2]In addition, Serota was permitted to sublease the apartment, rent free, until 1978.



On May 19, 1974, Mayor Ross was approached by petitioner Diaco, another official of Valentine Electric. Diaco used an assumed name (III Tr. 641-643) and asked if the Board of Adjustment's decision, scheduled for May 22, could at least be postponed. Ross was not cooperative. Diaco then asked, "Would money be help?" Ross secretly reported the incident to the United States Attorney the following morning (III Tr. 647; Pet. App. 6a).

On May 22, Diaco met with Ross and again asked for a delay. He said that "Serota has been taken care of" (III Tr. 648). He offered Ross first $200,000, then $400,000 for his assistance (III Tr. 669). While Diaco and Ross were talking, Orenstein and another individual appeared in the mayor's waiting room and sought to speak with him, but the mayor refused to see them (III Tr. 669-674). Orenstein had come, apparently, because he and the other IFC participants were becoming increasingly desperate to secure the zoning variance.

That evening, Diaco twice called Ross from Sutton's office. In the first call he offered a bribe of $500,000, but also threatened to expose something about Ross's administration (IV Tr. 693-697, 709, 710-726). Diaco made these calls in the presence of Sutton and Orenstein. While Diaco was making the first call, Orenstein was talking to Dansker and Haymes on another line, keeping them apprised of the situation. When Ross again said he could not postpone the meeting, Orenstein called to Diaco, "offer him anything" (VII Tr. 1566-1567). Diaco made a second call repeating his offers and threats, while Orenstein simultaneously telephoned Haymes and Dansker (VII Tr. 1569-1573).

The Board met as scheduled and rejected the zoning petition. Dansker then told Sutton to get the matter back on the Board's agenda as quickly as possible. Sutton again

sought Valentine's help (VII Tr. 1573-1579). Thereafter, on May 24, Diaco met with Ross, who purported to agree to sponsor a modified zoning plan in return for a $100,000 advance, plus $200,000 to $400,000 later. Valentine reported this to Sutton. Sutton said he could raise only $100,000; Valentine then gave Sutton $200,000 in cash in return for a $270,000 check (VII Tr. 1576-1582). Diaco and Sutton met with Ross again on May 26, and Diaco gave Ross $100,000 in cash, which he turned over to the FBI.

Sutton then called Haymes and Dansker to inform them of Ross's cooperation (VII Tr. 1584-1587). The next day, Sutton called Haymes and told him that he had written a check to obtain the funds to pay Ross and that he had to be reimbursed in order to cover the check. Haymes told him that "he will arrange it, not to worry, that they'll get money some place" (VII Tr. 1593).

2. In reversing petitioners' convictions based upon the Serota transaction (count III), the court of appeals held that, because Serota lacked actual or apparent authority to influence the zoning variance proceeding in an official capacity, the payment to him did not constitute illegal bribery under state law. Therefore it ruled no offense under the federal Travel Act, 18 U.S.C. 1952, was shown (Pet. App. 8a-17a).

Turning to the conspiracy conviction (count I), the court rejected the government's argument that the jury's conviction of the defendants on both substantive counts necessarily showed that the jury found a conspiracy to bribe Ross. The court noted that "[t]he district court * * * instructed the jury that if it found that the alleged conspiracy had as its illegal objective *either* the bribe of Ross or Serota it could convict the defendants" (Pet. App. 17a; emphasis in original). Since the jury could thus have found agreement to bribe Serota, but not Ross, the court reasoned



that "the possibility thus remains, albeit slim, that the jury found the defendants engaged in a conspiracy to bribe Serota alone in spite of its guilty verdict on Count II" (the Ross bribery) (Pet. App. 18a). Consequently, the court vacated the conspiracy conviction and remanded for a new trial on the Ross conspiracy only.

As to the substantive Ross bribery count (count II), however, the court affirmed. It held that the jury's deliberations were not tainted by the evidence relating to the conspiracy count. "The evidence concerning the two bribes was of such a nature that it could be easily compartmentalized by the jury and then considered independently by it under each separate count of the indictment" (Pet. App. 19a). It further held (*ibid.*):

> In any event, nearly all of the evidence concerning the defendants' dealings with Serota would have been admissible even if Count III had not been included in the indictment. The Serota transaction was an integral part of the defendants' scheme to obtain the variances needed for their project. Hence, evidence concerning it was clearly relevant to show the defendants' motive in approaching Ross with their proposition as well as their modus operandi.

The court also held that the trial judge did not err in refusing to disqualify himself under 28 U.S.C. 144. It concluded that the defendants' affidavits of bias under Section 144 were legally insufficient because they did not allege personal bias on the part of the trial judge (Pet. App. 19a-23a).

## ARGUMENT

1. Petitioners in Nos. 76-158 and 76-334 contend that the court of appeals should have set aside their convictions

based on the Ross bribe (count II), because it reversed their convictions on the Serota bribery count and the conspiracy count.

a. In effect, petitioners argue that given the instructions and evidence in this particular record, the Ross conviction must have been based in whole or part on the reversed convictions. However, as the court of appeals recognized, the Serota transaction "was an integral part of the defendants' scheme" to obtain variances (Pet. App. 19a). Since the jury convicted on all three counts, it necessarily must have found a concerted scheme to bribe both Mayor Ross and Serota. The court of appeals' legal conclusion that the bribery of Serota is not an offense under state law did not in any way undermine the finding the jury must have made that petitioners, together with Sutton, had agreed to a scheme to buy off Serota and Mayor Ross. The court of appeals erred therefore in vacating the conviction on the conspiracy counts and remanding it for a new trial.

Petitioners predicate their claims on this erroneous vacation of the conspiracy count. We submit, however, that those claims do not present any general issue warranting review by this Court. At most the effect of the error was to create the appearance of inconsistency in what was previously a wholly consistent jury verdict. Inconsistency is not a ground for reversal when it appears in an original verdict. *Hamling* v. *United States,* 418 U.S. 87, 101. There is no reason for a different result when the decision of a court of appeals creates an inconsistent verdict, particularly when the claimed inconsistency results from an erroneous overturning of a previously consistent jury determination.[3]

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[3]In so contending, of course, we do not suggest that the judgment of the court of appeals vacating the conspiracy conviction can be disturbed. No petition for a writ of certiorari to review that aspect of the judgment has been filed by the government.



b. Petitioners assert that the Court should review this case in order to establish guidelines for the courts of appeals in disposing of substantive counts when they reverse jointly tried conspiracy counts. But the disposition of such cases depends upon detailed analysis of the testimony and other evidence developed at trial. That analysis has already been made by the court of appeals; there is no reason for this Court to undertake it again.

Petitioners claim that they were prejudiced because, they speculate, the jury might not have believed the testimony of Arthur Sutton, the developer who initiated the project, who directly participated in the formulation of the bribery scheme, and whose testimony linked defendants Valentine and Diaco with the IFC defendants, Dansker, Haymes and Orenstein. Sutton gave direct, admissible evidence as to the details of the scheme. But he had also pleaded to a lesser offense, arguably had a strong personal motive for testifying on the government's behalf in hope of winning a more lenient sentence, and his testimony implicating the IFC defendants (Dansker, Haymes, and Orenstein), as well as Valentine, was not corroborated by tapes or other direct evidence.

We submit that the jury must have believed Sutton's direct evidence or it would not have convicted the IFC defendants and Valentine on both substantive counts. In any event, contentions as to whether the jury in a particular case might have disbelieved admissible evidence directly supporting its verdict furnish no basis for review by this Court.

Petitioners' interpretation of the record, moreover, is unsound. They contend that the jury must be deemed to have found that they conspired to bribe only Serota (Dansker Pet. 17). From this they theorize that the jury must have imputed to them vicarious liability for bribing Ross

because two of their co-conspirators in the Serota scheme (Sutton and Diaco) were directly involved in bribing Ross (Dansker Pet. 19) Their argument assumes, that in determining criminal responsibility for the Ross bribe, no effect whatever may be given to the jury's finding that petitioners jointly participated in buying off Serota, because the bribery of Serota was not a crime. But the noncriminal nature of the Serota bribe did not foreclose the court of appeals or the jury from finding that "the Serota transaction was an integral part of the defendants' scheme to obtain the variances" (Pet. App. 19a). Equally integral to the scheme was the bribery of Ross. The scheme to obtain the variances thus constituted a single joint venture in which all were involved, and for which all are responsible under basic principles of agency, even when no conspiracy has been charged. See, *e.g.*, *United States* v. *Spencer*, 415 F. 2d 1301, 1304 (C.A. 7); *Davis* v. *United States*, 409 F. 2d 1095, 1100 (C.A. 5); *United States* v. *Alsondo*, 486 F. 2d 1339, 1346-1347 (C.A. 2); *United States* v. *Golden*, 532 F. 2d 1244 (C.A. 9).

For example, in *United States* v. *Alsondo, supra*, the court of appeals sustained a conviction for the substantive offense of assaulting federal narcotics agents on the ground that the defendant participated in a joint venture to commit the crime, even though a simultaneously tried conspiracy conviction was reversed because of failure to prove scienter,[4] and even though the defendant did not participate in the assault.

The same agency principles permit the admission against all of each participant's acts and declarations in furtherance of the joint venture, even though conspiracy is not charged.

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[4]The scienter aspect of the decision was later reversed in *United States* v. *Feola*, 420 U.S. 671.



Fed. R. Evid. 801(d)(2)(E). See S. Rep. No. 93-1277, 93d Cong., 2d Sess. 26 (1974).

The evidence relating to the bribery of Serota was also admissible on the Ross count to show the motive, intent and method of operation of the participants in the scheme to obtain the variances. Fed. R. Evid. 403, 404(b).

Since the acts and declarations of the joint venturers in furtherance of the scheme to obtain the variances were properly admitted into evidence, the jury could, as the district court instructed, deem them "to be the acts of all of them and all of them are responsible for such acts if you find as to any particular defendant * * * that he has become a member of the conspiracy" (XI Tr. 3876, see also XV Tr. 3877-3878 and 3881). In any event, the trial court also cautioned the jury to consider each defendant's case separately (XV Tr. 3856, 3914) and it must be presumed that the jury obeyed these instructions.

c. The decision below is not in conflict with decisions of any other court of appeals. *United States* v. *Bentvena*, 319 F. 2d 916 (C.A. 2), is distinguishable. In that case a conspiracy conviction was set aside on the ground that the evidence was insufficient to connect the defendant to the alleged scheme. In these circumstances, the basis for the jury's consideration of the acts and declarations of the other conspirators against the defendant was undermined, and the substantive conviction was therefore reversed. In the case at bar, however, the conspiracy conviction was not reversed because the evidence was insufficient to tie the defendants to the basic joint venture, but because one aspect of it was not criminal.

Petitioners in No. 76-158 also claim that the decision below is in conflict with two other decisions of the court below and a decision of the Second Circuit (*United States* v. *DeCavalcante*, 440 F. 2d 1265, 1276 (C.A. 3); *Levy*

v. *Parker*, 478 F. 2d 772, 798 (C.A. 3); *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844, 865 (C.A. 2)) as to the proper test to be utilized in determining whether evidence relating to reversed counts has affected a jury's consideration of remaining valid counts. According to petitioners, under these cases the test is whether there exists a "reasonable possibility" of taint (Val. Pet. 15-16). But that was the test utilized below. The court of appeals concluded that "we believe that there was little possibility that the jury relied on improper evidence in reaching its guilty verdict" (Pet. App. 19a).[5]

2. Petitioners Valentine, Valentine Electric Company, and Diaco contend that the affidavits they filed pursuant to 28 U.S.C. 144[6] were sufficient to require the trial judge, to recuse himself on the ground that he was personally biased against them.[7] The affidavits pointed out that Valentine and

[5]The IFC petitioners also claim (Dansker Pet. 33) that the prosecution withheld evidence which might have been exculpatory, in violation of the due process requirement of *Brady* v. *Maryland*, 373 U.S. 83. The court of appeals correctly held (Pet. App. 46a), however, that this claim should be first presented to the trial court. Their further claim that the effect of the reversals of the Serota counts were not adequately argued before the court issued its opinion is refuted by that opinion (Pet. App. 17a-19a), and by the court's denial of the petition for rehearing (Pet. App. 69a).

[6]This statute provides that a judge is disqualified to sit in a case "[w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party."

[7]An initial indictment charged only Sutton and Diaco in a single count. Petitioner Diaco filed a motion for recusal against the district court judge and after a hearing, this motion was denied. Sutton then agreed to cooperate with the government and the first indictment was superseded by a second which charged petitioners and their co-defendants in three counts. Petitioner Diaco then moved a second time



Diaco had been principals of Valentine Electric since its formation in 1958, and that the trial judge, as United States Attorney for New Jersey between 1969 and 1971, had investigated the company. During this investigation, he made public statements concerning the company's underworld connections and invited competitors to voice any complaints to his office. The investigation eventually resulted in the indictment and conviction, for various extortion offenses, of Anthony Boiardo, then owner of one-third of Valentine Electric's stock, and Joseph Biancone, a Valentine employee.

As the court below pointed out, however, petitioners made "a number of significant concessions in their affidavits" (Pet. App. 21a). They acknowledged that Judge Lacey's statements were directed against Boiardo, the controlling figure of Valentine Electric, and that he had terminated all connections with the company in 1970. They also admitted that at the end of 1970, Judge Lacey's first assistant advised a law firm seeking to represent the company that "there was no longer any basis for believing that its principals were engaged in criminal activity" (*ibid.*). Further, the affidavits did not allege that petitioners Diaco or Valentine themselves were personally the targets of any investigation at any time.

The court of appeals carefully reviewed the affidavits and concessions made by petitioners, but found (Pet. App. 22a):

> Neither Valentine nor Diaco make a single allegation indicating that the district judge ever manifested, by word or deed, any hostility, animosity, or,

for recusal and was joined by petitioner Valentine and Valentine Electric Company. This motion was also denied. The second indictment was in turn superseded by a third, in order to correct certain technical defects. Diaco again moved for recusal, which was again denied.

> for that matter, any emotion whatsoever towards them personally.

Absent assertions of personal bias the allegations were insufficient. As the court of appeals held: "[A] trial judge need only recuse himself if he determines that the facts alleged in the affidavit, taken as true, are such that they would convince a reasonable man that he harbored a personal, as opposed to a judicial, bias against the movant" (*ibid.*).[8] Since the trial judge's earlier statements had not focused upon petitioners, it is difficult to perceive how he could have entertained "a closed mind on the merits of * * * [their] case." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583.[9]

Petitioners also contend that the district court improperly substituted his "outside recollection for facts alleged in the affidavit" (Diaco Pet. 7).[10] At the hearing on their first recusal motion, petitioner Diaco was represented

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[8]This is the same test imposed by 28 U.S.C. 455, as recently amended, by Pub. L. 93-512, 88 Stat. 1609, which is cited by petitioner Diaco (Diaco Pet. 14). That Section requires disqualification of a judge "in any proceeding in which his impartiality might reasonably be questioned." Removal is thus mandated only "if there is a reasonable factual basis for doubting the judge's impartiality * * *" H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 5 (1974).

[9]28 U.S.C. 144 does not require disqualification of a judge who has previously presided over a trial at which the movant was found guilty in either the same case or another one, or one in which persons alleged to have conspired with movant were found guilty. See *United States* v. *DiLorenzo*, 429 F. 2d 216, 220-221 (C.A. 2), certiorari denied, 402 U.S. 950; *Wolfson* v. *Palmieri*, 396 F. 2d 121 (C.A. 2); *Tynan* v. *United States*, 376 F. 2d 761 (C.A. D.C.), certiorari denied, 389 U.S. 845.

[10]Under Section 144 the trial court must accept the facts alleged as true and can only determine whether, accepted as true, they state a case of personal bias. See *Berger* v. *United States*, 255 U.S. 22, 33-34; *Davis* v. *Board of School Comm'rs of Mobile County*, 517 F. 2d 1044, 1051 (C.A. 5); *United States* v. *Trevithick*, 526 F. 2d 838 (C.A. 8); *United States* v. *Thompson*, 483 F. 2d 527, 529 (C.A. 3).



by the same firm that had been advised in 1970 that there was no longer any basis to believe that principals of Valentine Electric were engaged in any criminal activity. Nevertheless, this advice was not mentioned in the affidavit the firm submitted, even though it was accompanied by a certificate of good faith. The partner in charge of Diaco's case, Joseph McMahon, who was aware of this advice, did not appear at the hearing, nor did he sign the certificate. Instead another attorney from the firm handled the matter. At the judge's request, McMahon subsequently appeared and stipulated that the advice had been communicated. The trial judge then declined to disqualify himself, and Diaco retained his present counsel. The information elicited at the first hearing was included in the Section 144 affidavits subsequently submitted.

There was no error. The trial judge did not contest the accuracy of the facts initially alleged in the first Section 144 affidavit; he simply inquired whether the firm which had submitted the accompanying certificate of good faith had overlooked relevant facts known to the partner representing Diaco, as a result of assigning another attorney to the recusal motion. In any event, since those facts were included in the subsequent Section 144 affidavits, the court of appeals properly considered them in its review of the trial court's action on the subsequent motions.

## CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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DECEMBER 1976.

DOJ-1976-12

In The

# Supreme Court of the United States

October Term, 1976

No. 76-158

ANDREW VALENTINE and VALENTINE ELECTRIC COMPANY, INC.,
*Petitioners,*

—v.—

UNITED STATES OF AMERICA,
*Respondent.*

## REPLY OF PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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## REPLY OF PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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Inasmuch as the brief submitted on behalf of the Respondent contains serious misstatements of material facts appearing in the trial record, Petitioners Andrew Valentine and Valentine Electric Company, Inc., are constrained to submit this reply brief.

At page 6 of its brief, Respondent, in attempting to summarize the facts, states that "Valentine then gave Sutton $200,000 in cash in return for a $270,000 check (VII Tr. 1576-1582)." A careful reading of the pages cited by the Respondent, as well as the entire trial record, indicates, however, that this assertion is bereft

of factual support and entirely erroneous. Clearly, Sutton stopped the check and was never paid for it by Valentine (V Tr. 1594-1596).

A second misstatement of the record facts occurs at page 14 where Respondent, purporting to address the issue raised as to the bias of the District Judge, (Valentine Petition, pages 17-24),* states that,

> "Since the trial judge's earlier statements had not focused upon petitioners, it is difficult to perceive how he could have entertained a closed mind on the merits of . . . [their] case" (citing).

Lest there be any doubt, Andrew Valentine, as well as his namesake, Valentine Electric Company, were *each* named in the indictment, tried and convicted. Although Andrew Valentine was sentenced to the *maximum* jail term and fine permissible under law, Valentine Electric Company also was sentenced to pay the *maximum* fine permissible. Both Andrew Valentine and Valentine Electric Company have petitioned this Court and *both* are in law and fact petitioners.

Further, lest there be any doubt, during his tenure as United States Attorney for New Jersey, the District Judge consistently and unequivocally singled out the *Valentine Electric Company*—the very petitioner herein —as the subject of criminal investigation (Valentine Petition, pages 18-19). Indeed, given the public pronouncements and irrefutably jaundiced actions of the District Judge during his tenure as United States Attorney for New Jersey, we submit, there existed *not merely reasonable support* for the disqualification of the District Judge—the quantum of proof required by 28 U.S.C. 144

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* No. 76-158.



—but, an *irrefutable factual basis* for Petitioners' assertion that the District Judge should have disqualified himself (Valentine Petition, pages 18-19).*

In light of the record facts, the assertion by Respondent at page 14 of its brief that ". . . the trial judge's earlier statements had not focused upon *petitioners*" (emphasis supplied) truly falls outside the bounds of fair and proper advocacy. Rather than fairly confronting the crucial and decisive issue of the bias of the District Judge towards Valentine Electric Company and its principals, Respondent has simply chosen to disregard the corporate entity as a petitioner and to deny its existence. Indeed, even the Court of Appeals, whose determination we sincerely urge this Court to review, could not deny the allegations of demonstrable prejudice by the District Judge towards Valentine Electric Company and felt compelled to conclude that it raised a difficult problem (Valentine appendix, pages 24a-25a).

At page 15 of its brief, Respondent refers to a hearing between the District Judge and counsel who brought the recusal motion on the initial indictment handed down herein.** To state, as does Respondent, that "the trial judge did not contest the accuracy of the facts alleged in the first Section 144 affidavit; he simply inquired . . .", we submit, makes a mockery of the record facts.

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* For example, the *Newark Evening News, October* 9, 1969, quoted the District Judge as follows:

> "I say this—any competitor of Valentine, or any businessman who has reason to complain of Valentine's methods need only come to me. I'll order a complete investigation . . . Let's start with one simple step. Send me your rumors, your beliefs. Let us investigate them" (I Tr. 81).

** This hearing extended over two days (XI Tr. 1-100, I Tr. 108-170).

Plainly put, the hearing alluded to by Respondent represented nothing less than a full-blown inquisition replete with recriminations by the District Judge who, in defiance of 28 U.S.C. 144 and the holdings of this Court and the Courts of Appeals, *impermissibly subverted* the truth of the affidavit submitted in support of the recusal motion as well as the good faith of counsel who had brought the motion (Valentine Petition, pages 19-24; Respondent's Brief, page 14, footnote 10).

Central to this inquisitorial hearing was the assertion by the District Judge that because an opinion, which assertedly reflected his thinking, was given by a member of his staff at the Office of the United States Attorney in late 1970 to the law firm of Lum, Buinno and Thompkins, at their behest, that that firm would not be "embarrassed" by representing Valentine Electric and its principals Andrew Valentine and Joseph Diaco, his lack of bias toward Valentine Electric and its principals "now that Biancone and Boiardo were gone" became a matter of public record (I Tr. 163).

At the outset, the record reflects beyond peradventure that whatever response was given to the inquiry by the Lum law firm, it was, at best, informal and certainly clandestine, intended *not* as an official pronouncement publicly vindicating Valentine Electric and its principals but rather gratuitously and privately offered to the Lum firm to allay any potential "embarrassment" that might possibly accrue to such a prestigious firm if it represented Valentine Electric and/or its principals. Indeed, the stipulation dated September 6, 1974 and signed by Joseph R. McMahon, Esq., on behalf of the Lum law firm at the behest of the trial judge, specifically stated:

> "Of course, the United States Attorney's Office stated that it was not speaking officially and was just offering this information for whatever value the firm considered it to be" (I Tr. 137).



Moreover, despite the blockbuster tactics and strained interpretations by the District Judge at oral argument to cast doubt upon the good faith of counsel making the recusal motion and to transform the informal response privately given to the Lum firm to allay their "embarrassment" into a publicly declared "clean bill of health for Valentine Electric and its principals", the inescapable fact remains that neither the Lum firm nor the office of the United States Attorney *ever* considered the statement made to the Lum firm to be what the District Judge belatedly asserted it was. Lest this Court's attention be diverted from the *true nature and intent* of the representation made to the Lum firm by then First Assistant and now District Court Judge Herbert J. Stern, on behalf of the office of the then United States Attorney, we offer the following salient colloquy:

> "The Court: Here's the issue: I'm not concerned, really—and it's a matter with which I should not be concerned—what clients Lum, Biunno & Tompkins takes on. The point that I am making here is that you obviously had specific information of a telephone call made by a partner to my office.
>
> Mr. McMahon: Yes, your Honor.
>
> The Court: Which was designed to ascertain whether, to put it in the vernacular, my office would give Valentine Electric Company and its principals at that point following the expulsion of Boiardo and Biancone a clean bill of health.
>
> Mr. McMahon: Not quite, your Honor.
>
> The Court: All right, put in your terms.
>
> Mr. McMahon: We were engaged initially and only on a limited basis—and I might tell you that a period of time went by for over three or four months and detailed memoranda were presented to all the partners in the firm before the election

was made to go ahead and represent the company. The initial representation was just on the criminal case and before we undertook that representation the telephone call was made by Bill McGuire to Judge Stern and *it was not whether or not they were clean because, obviously, they are under investigation at the time and the investigation did continue for over a year* and I don't to this day know what quite happened with it" (I Tr. 119-120).

Contrary to the contention of the District Judge, perhaps the best evidence that the response to the inquiry of the Lum firm was not meant to indicate that Valentine Electric and its principals had been given a "clean bill of health" is that *after* the response was given to the Lum firm, the office of the United States Attorney, then under the direction of the Trial Judge, nevertheless, commenced a *new criminal investigation* into the activities of Valentine Electric and its principals (I Tr. 120).

## CONCLUSION

**For all of the above reasons and the reasons heretofore set forth, the petition for a writ of certiorari should be granted; the judgments of conviction should be reversed; and a new trial should be ordered.**

Respectfully submitted,

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